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In the Supreme Court of the United States

OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Is the Illinois innocent construction rule, under which material that is ambiguously defamatory is deliberately construed as innocent when in fact defamation and resulting damage have occurred, an arbitrary deprivation of property without due process of law and a denial of equal protection of the law?

2. Is the unprecedented refusal of the Illinois Appellate Court to allow opinions dealing with comment and criticism to be privileged without meeting the standards of the Illinois fair comment rule and the Illinois false implication rule an arbitrary and capricious exercise of power?

3. Is the action of the Illinois Appellate Court in omitting and substantially changing facts admitted to be true under a motion to dismiss, and upon which

facts solely a determination of defamation and malicious injury to property rights is to be made, an arbitrary and capricious exercise of power?

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

Petitioner, Paul S. Renard, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered in this proceeding on August 7, 1984.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First Judicial District, has not yet been reported, and is attached as Appendix B. The opinion and judgment affirmed the judgment of the Circuit Court of Cook County, Illinois, which will not be reported, and which is attached as Appendix A.

JURISDICTION

The judgment of the Illinois Appellate Court, First Judicial District, was entered

on August 7, 1984. A Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal was filed in the Supreme Court of Illinois on September 11, 1984. The said petition was denied on November 30, 1984, which denial is attached as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Section 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, 14th Amendment, Section 1, provides in pertinent part:

"...nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

I. Introduction

The plaintiff filed a first amended complaint at law with amendment (hereinafter referred to as "amended complaint"), in the Circuit Court of Cook County, Illinois, against the defendants Columbia Broadcasting System, Inc. (hereinafter referred to as "Columbia"), CBS Inc. (hereinafter referred to as "CBS"), Roosevelt University (hereinafter referred to as "Roosevelt"), Susan Anderson (hereinafter referred to as "Anderson"), Robert Wallace (hereinafter referred to as "Wallace"), Harry Porterfield (hereinafter referred to as "Porterfield"), James Hatfield (hereinafter referred to as "Hatfield"), and Sally Bauer (hereinafter referred to as "Bauer"). The said amended complaint is for libel, conspiracy to libel, malicious injury to property rights,

and conspiracy to maliciously injure property rights against all of the defendants, and in addition for fraud and conspiracy to defraud against the defendants Columbia, CBS, Porterfield and Hatfield.

The trial court granted the motions of all of the defendants to dismiss the amended complaint, and the Appellate Court of Illinois, First Judicial District, affirmed. A Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal was denied by the Supreme Court of Illinois without comment.

II. Statement of the Facts.

The plaintiff is a nationally and internationally known and well regarded musician, teacher, writer, lecturer and operator of a school in the teaching of the playing of piano, organ and other keyboard instruments in general. His tech-

nique of teaching the playing of these instruments is known as "Music Cynamics," such term being a service mark registered with the United States Patent Office and owned by him. During the years 1975 through 1979 the plaintiff wrote a series of monthly articles in a music magazine which was well regarded and widely read by the music industry throughout the United States. Many of these articles were highly critical of manufacturers and distributors of pianos and organs. Either or both of the defendants Columbia and CBS, either directly or through subsidiaries which they individually or jointly own or control, manufacture and distribute a variety of musical instruments, including pianos and electronic organs. Either or both of Columbia and CBS became enraged at the plaintiff because of the said articles, and have

continued up to the present time to harbor animosity towards him by reason thereof.

The defendant Bauer is an assistant professor of piano at the defendant Roosevelt's Chicago Musical College, which is located in a building immediately south of the building in which the music school and studios of the plaintiff are located. Students of music attending and enrolled at Roosevelt have from time to time taken lessons in playing the piano and organ and reading music at the school of the plaintiff, causing great embarrassment and anger to the defendants Bauer and Roosevelt, and creating animosity in both of them towards the plaintiff.

In addition to manufacturing and distributing pianos, organs and other musical instruments, as stated above, either or both of Columbia and CBS also owns, operates, controls and manages television

station WBBM-TV, broadcasting over television channel 2 in the Chicago, Illinois, metropolitan area. Either or both of Columbia and CBS produce a television program entitled "Two on Two." which is broadcast over channel 2. This program consists primarily of matters that may be of public interest, but are not immediate news. The program never, prior to April 13, 1980, made comparisons of the talents, features, merits, abilities or shortcomings of persons, products, services, or businesses that were featured on it, nor did it run contests (hereinafter referred to as an "ordinary 'Two on Two' program").

On or about April 8, 1980, the defendants Hatfield and Porterfield, together with a camera crew, came to the school and studios of the plaintiff and falsely and fraudulently represented to

him that his methods of teaching and reading music were to be used as a feature story on an ordinary "Two on Two" program the following Sunday. On the basis of these false and fraudulent representations, the plaintiff had students of his school perform before the camera by playing unrehearsed and at sight complex pieces of music on piano and organ. Unknown to the plaintiff, the defendants Columbia or CBS or both of them, had fraudulently concealed from him that, rather than intending to run a television feature story on an ordinary "Two on Two" program of his teaching methods and ability, they had instead entered him and his teaching ability and methods in a contest to be broadcast on the "Two on Two" program. In this contest, film clips of students of the plaintiff's school who had been taking lessons for two and three

years, playing the said complex pieces of music unrehearsed and at sight, were to be compared with students in a Northwestern University class in a 10-week program in beginning piano who were playing a rehearsed, simplified version of Brahm's Lullaby", all to be judged by the defendant assistant professor Bauer who harbored anger and animosity towards him. Furthermore, the television audience viewing this contest would not be told, although such were the facts, that the students of the plaintiff were playing complex pieces of music unrehearsed and at sight, nor that the playing of complex pieces of music at sight is a far more difficult and of a higher advanced level of learning that playing rehearsed simplified pieces of music, nor that the unrehearsed playing of a complex piece of music at sight does not have the smoothness of a rehearsed

piece of music, nor that the students in the said Northwestern University class were unable to play unrehearsed complex pieces of music at sight, nor that the defendants Bauer, Roosevelt, Columbia and CBS had animosity towards the plaintiff, nor that the plaintiff had not been informed that there was to be a contest, what the terms of the contest were and that he had been entered in it, nor that the plaintiff had been induced to allow the filming of students of his school by means of false and fraudulent representations of some of the defendants, nor that the withholding of all of the above information from the audience was pursuant to a conspiracy among all of the defendants carried on with the willful, wanton, and malicious intent of causing damage to the plaintiff's reputation, name, property and person.

On April 13, 1980, shortly after 10:30 P.M., the defendants Columbia, or

CBS or both of them broadcast over television Channel 2 in Chicago, Illinois, a program entitled "Two on Two" which contained a segment comparing the plaintiff's school with a Northwestern University 10-week program in beginning piano for adults. In this program, the instructor at Northwestern University and some of the students in her class were interviewed. The class was working on a rehearsed, simplified version of Brahm's "Lullaby", a piece of the utmost simplicity. Then the plaintiff and some of the students of his school who had been playing for several years were interviewed, one student being shown playing the "Berceuse" from the opera "Jocelyn", another student playing the Clementi "Sonatina No. 1", and another student playing the theme from "Dr. Zhivago". All of these were complex pieces of music and played unrehearsed and at sight by the students, but the

television audience was deliberately not told this in furtherance of the scheme to defame and damage the plaintiff.

After the above interviews, the following statements, among others, were made on the program:

WALLACE: "After hearing students from Music Dynamics and from Northwestern play, we wondered which program might be the better for someone anxious to learn to play for fun, but also play well. Sally Bauer is an Assistant Professor of Piano at Roosevelt University's Chicago Musical College. We showed her tapes of students from both Music Dynamics and Northwestern's Beginning Adult Class".

BAUER: "From the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have

spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern".

WALLACE: "Mrs. Bauer emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While a Music Dynamics student might to some ears sound a bit mechanical and lack complete musician ship, Mrs. Pauline Archias is quite satisfied...".

III. Federal Questions Arising in the Circuit Court of Cook County, Illinois

In the plaintiff's Memorandum of Law in Opposition to Motions of Defendants to Dismiss First Amended Complaint, as Amended, filed in the Circuit Court of Cook County, Illinois, the plaintiff raised two Federal questions (C448-50):

A. The Illinois innocent construction rule is void by reason of being in viola-

tion of Article 1 of the 14th Amendment to the United States Constitution in that the deliberate construing of material that is ambiguously defamatory as innocent when in fact defamation and resulting damage have occurred is an arbitrary deprivation of property without due process of law.

B. The Illinois innocent construction rule is void by reason of being in violation of Article 1 of the 14th Amendment to the United States Constitution in that the deliberate construing of material that is ambiguously defamatory as innocent when in fact defamation and resulting damage have occurred is a denial of equal protection of the law.

The memorandum of law also raised the following two further questions that were not Federal in nature at the trial level,

but would become so at the appellate level:

C. Whether the television audience was given sufficient facts to have met the requirements of the fair comment rule so as to make the comments of the defendants Bauer and Wallace protected opinions.

D. Whether a malicious injury to a property right can exist if there is no defamation of the person.

The trial court by written order disposed of these particular items as follows (Appendix, pp. A-9-10):

1. The matters concerning the Federal question of denial of due process of law and denial of equal protection of the law in connection with the innocent construction rule were not considered, the court holding that the program could be innocently construed as an innocuous presentation regarding two music programs.

2. The comments of the defendant Bauer were ruled to be nonactionable without any mention of the requirements of the fair comment rule.

3. All other claims for relief, including that of malicious injury to a property right in the plaintiff's school and in the service mark "Music Dynamics", were held to fail to state causes of action because there was no defamation.

IV. Raising of Federal Questions in the Appellate Court of Illinois, First Judicial District

Upon appeal to the Appellate Court of Illinois, First Judicial District, the plaintiff again raised in his briefs, inter alia, the matters which had been raised in the trial court, plus the following additional matters in response to the opinion of the trial court:

A. Whether defamatory statements not otherwise privileged can be priv-

ileged as opinions under the First Amendment to the United States Constitution without meeting the requirements of the fair comment rule. (Appellant's Brief, p. 27)

B. Whether defamatory statements not otherwise privileged can be privileged as opinions under the First Amendment to the United States Constitution without meeting the requirements of the false implication rule. (Appellant's Reply Brief, p. 26)

In addition to the above matters, the defendants in their brief ceased to make any effort to show that there were sufficient facts to support the statements on the telecast as privileged opinions under the fair comment rule, but instead stated that "Defendants do not at this pleading stage of the case claim the 'fair comment privilege'...." (Appellee's Brief, p. 18)

The Appellate Court affirmed the dismissal by the trial court, and disposed of the matters raised above as follows (Appendix B, pp. B9-B12):

1. The innocent construction rule was held not to be a denial of due process of law and of the equal protection of the law under the 14th Amendment to the United States Constitution.

2. The comments made on the program were held not to be defamatory because they could be innocently construed as nonactionable opinions. No mention was made of the requirement of the fair comment rule and of the explicit waiver of the fair comment privilege by the defendants.

3. Since the statements on the program were nonactionable opinions, there were no false statements of fact injurious to plaintiff's reputation.

4. Since the statements on the program were nonactionable opinions, the remaining counts, including malicious injury to property rights, were also nonactionable.

REASONS FOR ALLOWANCE OF THE WRIT

I

THE ILLINOIS INNOCENT CONSTRUCTION RULE IS VOID BY REASON OF BEING IN VIOLATION OF ARTICLE 1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE DELIBERATE CONSTRUING OF MATERIAL THAT IS AMBIGUOUSLY DEFAMATORY AS INNOCENT WHEN IN FACT DEFAMATION AND RESULTING DAMAGE HAVE OCCURRED IS AN ARBITRARY DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW AND A DENIAL OF EQUAL PROTECTION OF THE LAW

A. Arbitrary Deprivation of Property Without Due Process of Law

There is an old joke concerning two psychiatrists that pass each other on the sidewalk. The first says "Hello," and the second replies "Hello." After they pass, the first psychiatrist then says to himself, "I wonder what he meant by that?"

That old joke illustrates a central problem with the law of defamation: all

language, even an exchange of one word, can be interpreted ambiguously. Nearly all states solve this dilemma by determining as a question of fact what a particular ambiguously defamatory statement meant under the circumstances in which it was made. Indeed, a jury is usually a perfect device to determine the meaning of the statement, since it represents a cross section of the community in which it was made. Illinois, however, follows the innocent construction rule. Chapski v. Copley Press, 92 Ill. 2d 344, 442 N. E. 2d 195 (1982). Under this rule a determination is not made as to whether defamation has in fact occurred, but whether a defamatory statement can be reasonably innocently construed under the circumstances in which it was made as a matter of law, regardless of how in fact the statement was actually interpreted

by the audience receiving it. Thus, in nearly all states, if a party makes an ambiguously defamatory statement, and it is determined as a matter of fact to be defamatory, the maker of the statement will be held responsible for his ambiguity, and will be required to make restitution to his defamed victim. In Illinois, however, if a party makes an ambiguously defamatory statement, and it is determined as a matter of law that it can be reasonably innocently construed, then even though the audience has in fact interpreted it as defamatory, and the defamed victim is thereby damaged, the maker of the statement will not be held responsible for his ambiguity, and will not be required to make restitution to his defamed victim. The defamed victim is thus left with damages and no remedy, and the maker of the ambiguous statement is

left doubling up with laughter at both the victim and the judicial system.

This lack of protection to the victim of ambiguous defamation caused the California Supreme Court to reject the innocent construction rule and rejoin virtually all the other states after suffering under its injustice for 17 years. In MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P. 2d 36 at 44 (1959), the court stated as follows:

"Such hair-splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communcations between ordinary human beings ... It protects, not the innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamation who deliberately casts a grossly defamatory imputation in ambiguous language."

The above description of the clever writer, of course, is also a perfect thumbnail description of the defendant Hatfield in the present case, who was the writer, producer and director of the Two on Two program, and who further admitted that he made false representations to the plaintiff just to get him onto the program.

It thus becomes clear that the deliberate construing of material that is ambiguously defamatory as innocent when in fact defamation and resulting damage have occurred furthers no public purpose other than protecting malicious, deliberately ambiguously defamatory writers. The defamed victim, incurring damage thereby and left with no remedy, thus suffers an arbitrary deprivation of property without due process of law.

The courts now recognize that injury to reputation combined with loss or damage

to property interests constitute a right protected by due process of law. Smith v. Town of Golden Beach, 403 S. 2d 1346 (Fla. App. 1981), Fitzgerald v. Mountain Laurel Racing, 607 F. 2d 589, Allison v. City of Live Oak, 450 F. Supp. 200 (D. C. Fla., 1978). A malicious injury to property rights such as the school of the plaintiff and the service mark "Music Dynamics," would constitute such protected interests.

B. Denial of the Equal Protection of the Law

The innocent construction rule has the effect of creating two classes of defamed persons.

One class consists of those persons who are defamed by ambiguous defamatory language which cannot be reasonably innocently construed. Persons of this class may maintain actions for defamation if all other requirements for such actions are met.

The other class consists of those persons who are defamed by ambiguous defamatory language that can be reasonably innocently construed, even though the audience who received the defamatory language in fact interpreted it in its defamatory meaning. Persons in this class may not maintain actions for defamation even though they suffer grievous damage by reason of the audience interpreting the language in its defamatory meaning.

The equal protection clause requires that classifications cannot be founded upon distinctions which are unreasonable and arbitrary. The classifications and distinctions must have some relevance to the purpose for which they are made. Rinaldi v. Yeager, 348 U. S. 305, 86 S. Ct. 1497, Police Dept. of Chicago v. Mosley, 408 U. S. 92, 92 S. Ct. 2286. Yet there appears to be no reason to distinguish

between the two classes created under the innocent construction rule. The defamed persons in each class conduct themselves in the same ways, have the same physical attributes, engage in the same businesses and professions, have the same relationships or lack thereof with their defamers, and suffer the same damages upon being defamed. There hardly exists a defamation suit in Illinois in which the defamer does not assert one or more possible innocent constructions. A cursory review of the Illinois digests will reveal that a large number, perhaps even a majority, of these defenses are upheld. The result is that a sizeable portion of all defamed persons are denied a right of recovery by reason of being made members of a class which they were relegated to without any conduct or choice whatever on their part.

Nor is there any benefit to the public from these classifications. The New York Times and The Washington Post do not use any different standards to protect themselves from libel in reporting the news than do the Chicago Tribune and the Chicago Sun-Times. Nationwide television media, including the defendant CBS, exhibit identical programs nationwide. National news magazines send the same news material to Illinois as they do to all other states. It thus appears that the California Supreme Court was quite right in asserting that the persons protected by the innocent construction rule are not innocent defamers, but clever deliberate ambiguous defamers. The protection of such a very small and unworthy group by denying the right to a remedy to one half of the persons defamed is in derrogation of the public good, since it serves no

useful purpose. Consequently the classifications arising under the innocent construction rule are unreasonable and arbitrary, and a denial of the equal protection of the law to the people of Illinois.

The rationale behind the innocent construction rule was set forth in Antonelli v. Field Enterprises, Inc., 115 Ill. App. 3d 432, 450 N. E. 2d 876 (1st Dist., 1983), in which the court stated as follows, except that the citations are omitted:

"The strongest reason advanced in support of the rule is one particularly apt under the facts of this case: that the rule is in consonance with the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs."

This is indeed a noble and worthy purpose. However, robust discussion of daily affairs is not encouraged by rigged contests, fraudulent conduct, and conspiracies run by national television media. Surely recent news events have made clear that the protection afforded by New York Times Co. v. Sullivan, 376 U. S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), and its descendants give overwhelming protection to the press from its public victims without the additional injustice of the innocent construction rule.

II

THE ACTION OF THE APPELLATE COURT IN ALLOWING OPINIONS TO STAND WITHOUT MEETING THE STANDARDS OF EITHER THE FAIR COMMENT RULE OR THE FALSE IMPLICATION RULE WAS AN ARBITRARY AND CAPRICIOUS EXERCISE OF POWER

Although the plaintiff vigorously asserted the fair comment rule and the false implication rule in the Appellate

Court, the opinion makes no mention whatsoever of either of the rules, and takes no action in connection with them.

An opinion dealing with fair comment and criticism can only be privileged so as to be protected from defamation actions not just because it is an opinion, but because it is an opinion which meets the standards of the fair comment rule.

In Catalano v. Pechous, 69 Ill. App. 3d 797, 387 N. E. 2d 715 (1st Dist. 1978), the court set forth the fair comment rule as follows (69 Ill. App. 3d at 808, 387 N. E. 2d at 723):

"Four criteria must be met in order that fair comment be deemed not actionable: (1) the publication must be of an opinion, (2) it must relate not to an individual but to his facts, (3) it must be fair in the sense that the reader can see a factual basis for comment and draw

his own conclusions, and (4) it must relate to a matter of public interest."

No. 3 of the above criteria is especially relevant to the present case, and its importance was emphasized in Belt v. Tribune Co., 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1st Dist., 1955). The court in that case stated as follows:

"It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts ... this privilege to criticize is forfeited unless the facts are truly stated." 6 Ill. App. 2d at 494, 128 N. E. 2d at 640.

In addition to the above criteria, the opinion must be made with an honest purpose and not maliciously. This aspect will be discussed later below.

The present case is a shocking catalogue of omissions of fact which have the effect of presenting an unfair and

false statement of facts to the television audience. The defendants admit by their motions that the following facts as set forth in the amended complaint were omitted from the broadcast:

1. That the students of the plaintiff were playing complex pieces of music unrehearsed and at sight.

2. That the playing of complex pieces of music at sight is a far more difficult and of a higher advanced level of learning than playing rehearsed simplified pieces of music.

3. That the unrehearsed playing of a complex piece of music at sight does not have the smoothness of a rehearsed piece of music.

4. That the students in the Northwestern University class were unable to play unrehearsed complex pieces of music at sight.

5. That the defendant Bauer had animosity towards the plaintiff because students of music attending and enrolled at the defendant Roosevelt had from time to time taken lessons in playing the piano and organ and in reading music in connection thereto at the music school and studios of the plaintiff, causing great embarrasment and anger to the defendant Bauer and her employer and principal, the defendant Roosevelt.

6. That either or both of the defendants Columbia and CBS had animosity towards the plaintiff because he had written articles critical of the practices of manufacturers and distributors of pianos and organs, a business which either or both of them were also engaged in.

7. That by reason of the said articles either or both of the defendants Columbia and CBS had also terminated

negotiations with the plaintiff for the right to use his techniques in playing of the piano and organ and in the reading of music in connection thereto through music dealers who sold the lines of pianos and electronic organs manufactured or distributed by the said defendants.

8. That the plaintiff had not been told that the demonstration of his students playing complex pieces of music unrehearsed and at sight and all other filming and taping that had been done by either or both of Columbia and CBS at his school and studios were all part of a contest.

9. That the plaintiff had not been told what the terms of the contest were.

10. That the plaintiff had not been told that he had been entered in the contest.

11. That the defendants Columbia or CBS or both of them were allowed to

photograph and produce the film clips of the plaintiff and his students by having their employees and agents, the defendants Porterfield and Hatfield, falsely and fraudulently represent to the plaintiff that they were to be used on an ordinary "Two on Two" program, and falsely and fraudulently concealing from him that they were to be used in a contest.

The concealing from the television audience of the eleven omissions of fact set forth above precluded any possibility that it could see a factual basis for comment and draw its own conclusions. The opinions and comments were consequently predicated on an unfair and false statement of facts.

As was mentioned briefly above, opinions to be privileged must also be made with an honest purpose and not maliciously. In Beauharnais v. Pittsburgh

Courier Publishing Co., 243 F. 2d 705 (CA 7, 1957), the court, in explaining that criticism and comments must be made fairly and with an honest purpose, stated as follows:

"Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously.

"Fair comment (on a matter of public concern) may be severe and may include ridicule, sarcasm, and invective. *** But severity and vigor in expression, whatever evidential effect they may have, are not to be confused with malice in motive." 234 F 2d at 708

In Goldwater v. Ginzberg, 261 F. Supp. 784 (S.D.N.Y. 1966), aff'd 414 F. 2d 324 (2d Cir. 1969), cert. denied, 396 U. S. 1049 (1970), the court stated as follows:

"In any event, even if all the statements were opinions only, proof of actual malice would take away from defendants the privilege conferred by the Sullivan principle. Such was stated in a footnote to the Sullivan opinion (376 U. S. at 292, 84 S. Ct. at 732 n. 30):

"'Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice ***.'" 261 F. Supp. at 787

Paragraphs 17 and 17A of each of Counts I through VI and paragraphs 17B and 17C of Count VI allege malice and facts giving rise to malice. In addi-

tion, the animosity of the defendants Columbia, CBS, Bauer and Roosevelt towards the plaintiff as set forth in the amended complaint are all indicative of malice, as are the omissions of fact as set forth above. Finally, the defendants by their motions admit the malice as alleged in the complaint.

Since the comments, criticisms and opinions of the defendants Bauer and Wallace were both made and broadcast maliciously, the fair comment privilege is not available.

The Appellate Court relies on Zaret v. Joliet Park District, 91 Ill. App. 3d 225, 415 N. E. 2d 659 (1980), where the plaintiff claimed libel from a published statement of a park commissioner which compared two building contractors' bids for a project and concluded that one builder would do a better job. An exam-

ination of that case shows that it involved bids for the same job, and that there were no allegations of any facts being withheld from the public or that the statement was made with malice. In the present case, students in a 10-week beginners course played a rehearsed, simplified piece of music and who were not able to play unrehearsed and at sight complex pieces of music were compared in a contest with students of two and three years' experience in a program which had taught them to play unrehearsed complex pieces of music at sight, the television audience of 250,000 was not told all of the above facts, and the opinions were made and the program was broadcast not with an honest purpose, but with animosity and malice. Furthermore, it is obvious that when a person enters a contest, it is expected that there will be winners and

losers. In the present case it was fraudulently concealed from the plaintiff that he had been entered in a contest. It should be noted that the court in the Zaret case does not mention the fair comment rule, presumably because it was not raised and hence was waived by the plaintiff. Perhaps he felt that revealing the facts behind a public bidding job would not be a wise course to follow. Whatever the reason, no assertion was made that any facts had been withheld so that the fair comment rule was not available. Finally, there is a vast and defamatory distinction between saying with an honest purpose that one bidder can do a better job than another, and falsely and with malicious intent saying that one bidder of many years experience couldn't do as good a job as a beginning 10-week apprentice.

A case relied upon by the trial court is Byars v. Kolodziej, 48 Ill. App.

3d 1015, 363 N. E. 2d 628 (1977). In that case, the head of the political science department at a university issued an interdepartmental memo stating that neither the quantity nor quality of a professor's scholarly published work justified a grant of tenure. The court held the statement not to be libelous. The case is readily distinguishable from the present cause, since the professor's scholarly published work was available for all to see as a factual background, and the professor made no assertion that any facts had been withheld. Under such circumstances, the fair factual background required by the fair comment rule was satisified. Also, the professor well knew that his scholarly published works would be considered in determining whether he would be granted tenure, whereas in the present case it was fraudulently

concealed from the plaintiff that he had been entered in a contest. Finally, there is a vast and defamatory distinction between saying with an honest purpose that neither the quantity nor quality of a professor's scholarly work justified tenure, and falsely and with malicious intent saying that neither the quantity nor quality of a professor's scholarly work had reached the level of a beginning 10-week freshman student.

The defendants state on page 18 of their brief that "Defendants do not at this pleading stage of the case claim the 'fair comment privilege' as described in Catalano v. Pechous, 69 Ill. App. 3d 797, 387 N. E. 2d 714 (1st Dist., 1979), affirmed 83 Ill. 2d 146, 419 N. E. 2d 350 (1980), and to which plaintiff addresses his arguments on the issue of opinion. (Appellant's Br. pp. 27-34)

Rather, our arguments expose plaintiff's failure and inability to plead that the telecast contains a false statement of fact. As the Catalano court recognized (387 N. E. 2d at 723): 'a writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expression of it might be.'"

The defendants completely ignore the concept that an opinion even under the above Catalano reference, which does not meet the standards of the fair comment rule loses its character as an opinion, and is deemed to be a statement of fact. Thus, in the Restatement of the Law of Torts, Volume III, under Section 606 where the fair comment rule is given, the following comment is made on page 276:

"b. Comment distinguished from statement or implication of fact. Comment

or criticism is an expression of the opinion of the commentator or critic upon the facts commented upon or criticized. If the facts are not known, a statement, though in form the expression of an opinion, carries with it the implication of facts to support it and is thus more than the mere expression of an opinion ...."

This was the law in Illinois even prior to the restatement. See Cooper v. Illinois Publishing and Printing Co., 218 Ill. App. 95 (1st Dist., 1920), in which it was held that where statements were made in an article that a judge was unfit because of his trial record, without stating what the offensive trial record was, the readers of the article were not given any opportunity to make inferences and deductions to determine whether the comments were reasonable, and consequently the words were statements of fact and not comment.

It is also current law today. In Kapiloff v. Dunn, 27 Md. App. 514, 343 A 2d 251 (1975), the court, after taking into consideration Sullivan v. New York Times, stated in 343 A. 2d at 263 as follows:

"We believe that comments, criticisms and opinions concerning the involvement of public persons in matters of public or general interest or concern are within the protection of the constitutional privilege. When such commentary is not based upon stated facts or upon facts otherwise known or readily available to the present public, it is treated as a factual statement and possible constitutional immunity is determined on that basis." (Emphasis by the court)

Based upon the above authorities alone, it is clear that the statements of the defendants Bauer and Wallace can-

not possibly be regarded as isolated opinions, but must be regarded as statements of fact. They have further been shown as stated above not to qualify as fair comment, in addition to which the defendants have specifically stated in their brief that they do not claim the fair comment privilege. Since paragraph 16 of Counts I through VI of the amended complaint alleges that the statements of the defendants Bauer and Wallace are false, there are allegations of false statements of fact. (C 319)

There is also an additional manner in which the statements of the defendants Bauer and Wallce have become facts.

In Catalano v. Pechous, 69 Ill. App. 2d 797, 387 N. E. 2d 714 (1st Dist., 1979), referred to above, the court determined that a statement was factual rather than an opinion, and therefore could not

constitute fair comment or criticism and was not privileged. The court further stated, however, as follows:

"Even assuming that this statement was merely one of opinion, liability for libel may attach with a negative characterization of a person coupled with a clear but false implication that he was privy to facts about the plaintiffs and their actions. Hotchner v. Castilleo-Puche (2d Cir. 1977), 551 F 2d 910, 913."

The defendant Wallace introduced the defendant Bauer on the broadcast by stating that "We showed her tapes of students from both Music Dynamics and Northwestern's beginning adult class." (Emphasis supplied) (C 317) The defendant Bauer then began by stating "From the tapes that we have seen of those two programs ..." (emphasis supplied) and then made her statements concerning

the programs. (C 317) There is a clear implication here that the defendants Bauer and Wallace had tapes of programs available to them as well as tapes of students. Furthermore, the audience was not given any correlation between tapes shown on the program and the tapes that the defendants Bauer and Wallce commented on. When this implication of the existence of additional tapes which the audience had not seen was coupled with the negative characterization of the plaintiff, his program and his school, their statements became factual.

Based on all of the above overwhelming material, the Appellate Court clearly acted in an entirely arbitrary and injurious manner on holding that the statement of the defendant Bauer was a nonactionable opinion. (C 471) The court made no ruling at all on the statement of the defendant Wallace.

Although the defendants have waived the fair comment privilege, the matters of fact omitted from the broadcast which preclude fair comment are fully set out in paragraph 12 of Counts I through VI of the amended complaint, and the plaintiff is prepared to prove that they are all true. (C 310-312)

It is well established that the Supreme Court may interfere with the arbitrary or capricious exercise of power by state courts. American R. Express Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353 (1927)

The action of the Appellate Court in allowing an opinion to stand without meeting the standards of either the fair comment rule or the false implication rule is unprecedented in American jurisprudence. It is an open license to a tyrannical, irresponsible press who would

be able to make any statement whatsoever under the guise of opinion without regard to any factual basis. Although such practice is common in Pravda and Izvesta, action by the Supreme Court is urgently warranted and needed to prevent this practice from becoming the law of Illinois, and eventually throughout the United States.

III

THE ACTION OF THE APPELLATE COURT IN OMITTING AND SUBSTANTIALLY CHANGING FACTS ADMITTED TO BE TRUE UNDER A MOTION TO DISMISS, AND UPON WHICH FACTS SOLELY A DETERMINATION OF DEFAMATION AND MALICIOUS INJURY TO PROPERTY RIGHTS IS TO BE MADE, IS AN ARBITRARY AND CAPRICIOUS EXERCISE OF POWER IN VIOLATION OF PARAGRAPH 1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Appellate Court in its opinion made the following omissions and substantial changes to the facts admitted to be true under the motions to dismiss (Appendix, pp. B-3-4):

A. The opinion states that "Plaintiff's program differs from the Northwestern program in that plaintiff teaches students to read and play music by responding to the numerical distances between notes, while the Northwestern course teaches through traditional methods."

The telecast presented the Northwestern program as a 10-week program in beginning piano for adults in its electronic piano lab, using modern electronic equipment and emphasizing practice. Practice can be considered traditional, since it has been used since the piano was invented. However, Mozart never learned to practice in an electronic piano lab. Consequently, the Northwestern program is one which uses modern electronic methods to teach the traditional concept of practice. (C 313) Since the course

is only 10 weeks in length, its students can hardly play at all. (Appellant's reply brief, pp. 13-14) This is not meant to criticize the Northwestern program, but merely to point out the limitations of what can be humanly accomplished in only 10 weeks.

The Music Dynamics program of the plaintiff is a sight reading program using modern reflex concepts. Sight reading can also be considered traditional, since it has also been used since the piano was invented. Mozart was an excellent sight reader, but he didn't learn it at Music Dynamics. Consequently, the Music Dynamics program is one which uses modern reflex methods to teach the traditional concept of sight reading.

Thus, both the Northwestern program and the plaintiff's Music Dynamics program use modern methods to teach traditional concepts.

There are nevertheless substantial differences between the two programs:

1. The Northwestern program is only 10 weeks long, and consequently can only produce students who can hardly play, while the Music Dynamics students shown on the Two on Two program had been with Music Dynamics for two, three, and in one case, twelve years. (C 316-318) By such periods, they had reached a high degree of playing proficiency.

2. Music Dynamics students are sight readers who can also practice, while the Northwestern students can play only by practice and can't sight read.

3. Music Dynamics students can play complex pieces at sight as well as by practice, while the Northwestern students can only play rehearsed simplified pieces.

B. The opinion states that "the stated purpose of the "Two on Two" seg-

ment was to examine beginning piano courses for adults who wished to attain a moderate level of skill in playing that instrument."

No such statement was ever made. The closest the program came to giving a stated purpose was by the defendant Wallace, when he stated in the introductory part of the program as follows:

"No, this man doesn't take lessons. He's Vladimir Horowitz. He is to the private pianist as Jack Nicklaus is to Saturday golfers. And it's much in that vein that adults are flocking to the piano bench these days, not to become a Horowitz or a Brubeck but simply to have fun." (C 313)

As shown in No. 1 above, the Northwestern program, being of only 10 weeks' duration, could not possibly produce anything even approaching a moderate

level of skill, nor did the Northwestern instructors make such a preposterous assertion.

C. The opinion states that "the Northwestern students were shown playing a simplified, rehearsed piece while plaintiff's students were shown playing complex pieces at first sight. The television audience was not informed of the different circumstances under which the students from the two schools were performing." (Appendix, p. B-3)

In addition to the audience not being told the above, it was also not told the great number of additional matters set forth in Point II above dealing with the fair comment rule and false implication rule.

D. The opinion states that the defendant Bauer was asked her opinion as to which program would be better for an

adult who wished to attain a moderate level of skill in playing the piano.

The question was actually raised by the defendant Wallace in the following manner:

"After hearing students from Music Dynamics and from Northwestern play, we wondered which program might be the better for someone anxious to learn to play for fun, but also play well." (Emphasis supplied) (C 317)

The Random House Dictionary of the English language defines the word "moderate" to mean "of medium quantity, extent, etc.: a moderate income...syn. average."

The court thus equates the ability to play the piano for fun, but also play well, to mean an average piano player. It would seem more reasonable that a person who plays for fun, but also plays

well, plays better than an average piano player. Music Dynamics students often are much better than average piano players. In any event, the students in the 10-week Northwestern course, who can hardly play at all, obviously do not fit either category.

The above omissions and substantial changes made to parts admitted to be true can only be regarded as an arbitrary and capricious exercise of power. It is elemental that the court's decision of the law to be applied to the case would be dependent upon the facts before it.

Equally alarming is the fact that this violation of due process of law under the 14th Amendment to the United States Constitution is in addition to the due process violations set forth under I and II above as reasons for allowance of the writ.

Considered together, the violations set forth under I, II and III above constitute a clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. American R. Express Co. v. Kentucky, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353 (1927)

CONCLUSION

For all and each of the foregoing reasons, this Court should issue a Writ of Certiorari to review the judgment and opinion of the Appellate Court of Illinois, First Judicial District.

Dated: February 27, 1985
Chicago, Illinois

Respectfully submitted,

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c/o Music Dynamics
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Attorney for Petitioner

APPENDICES

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL RENARD, Plaintiff	)	
vs.	)	No. 81 L 8289
COLUMBIA BROADCASTING SYSTEM, INC., et al., Defendants	)	

O R D E R

This matter comes on to be heard on the motion of the defendants, CBS Inc., Columbia Broadcasting System, Inc., Susan Anderson, and other named individual defendants, to dismiss plaintiff's first amended complaint, as amended, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, Illinois Revised Statutes, Chapter 110, Section 2-615.

The defendant, Roosevelt University, has also filed a motion to strike and dismiss pursuant to Section 2-615.

The court has heard the oral arguments of counsel, considered the memoranda submitted by the parties, and is duly advised in the premises.

Plaintiff has filed a six count complaint complaining of a "Two on Two" broadcast, which plaintiff asserts caused him to be libeled by the defendants.

The specific arguments of the defendant, Roosevelt University, will not be addressed inasmuch as the resolution of the contention of the defendants CBS Inc., et al., necessarily resolves the issues as they relate to Roosevelt.

The first amended complaint, as amended (hereinafter sometimes referred to as "the complaint") as characterized by the plaintiff, is for libel, conspiracy to libel, malicious injury to property rights, and conspiracy to maliciously injure property rights against

all defendants; and in addition for fraud and conspiracy to defraud against the defendants, CBS Inc., et al.

The gist of the plaintiff's complaint leading to the six county complaint is that the "Two on Two" broadcast was understood by its viewers to mean as set forth in paragraph 13 of the first amended complaint, as amended that the plaintiff and his school "were so completely lacking in knowledge, competence, and ability in connection with the teaching of the playing of the piano, and organ, and in the selection and use of teaching programs, materials and equipment in connection with such teaching, that it would be better for someone anxious to learn to play the piano or organ for fun, but also to play well, to merely take a ten week program in beginning piano for adults at Northwestern

University rather than taking lessons from the plaintiff and his staff at his school for as long as two or three years, since adults who had taken lessons in the playing of the piano and organ from the plaintiff and his teaching staff at his school for two and three years, after such time still might sound a bit mechanical and lack complete musicianship, still had not reached a musical level equal to that in a ten week program in beginning piano for adults at Northwestern University, and still did not even have as much independence musically as the works of students in the said Northwestern University program." Further, that these statements were false.

The plaintiff alleges that the broadcast was thus libelous per se, constituted libel per quod, that the opinions expressed on the program were not priv-

ileged, and that the program could not be innocently construed.

Attached to this order as Appendix A is a copy of the broadcast as is set forth in paragraph 13 of plaintiff's first amended complaint, as amended.

The defendants assert that the broadcast is neither libelous per se, libel per quod, or otherwise actionable, but merely an expression of opinion, and also non-actionable under the innocent construction rule.

Inasmuch as the other allegations are all inextricably intertwined with the libel allegations, the defendants contend that they, too, must fail.

To state a claim for libel, statements, or in this case the broadcast, must in the first instance be defamatory.

Defamatory statements are either libelous per se or per quod. Bruck

v. Cincotta, 56 Ill App. 3d 260, 371 N. E. 2d 874 (1977).

Words in a publication are considered libelous per se if they are so obviously and naturally hurtful that proof of injury is unnecessary. See Springer v. Harwig, 94 Ill. App. 3d 281, 418 N. E. 2d 870 (1981).

In that case proof of an injury is dispensed with, and damages are presumed. Kirk v. Village of Hillcrest, 31 Ill. App. 3d 1063, 335, N. E. 2d 535 (1975).

Words are libelous per quod if false, but require an innuendo to give them a libelous meaning, and require evidence to show that as a matter of fact some substantial injury has followed from their use. Kirk, supra.

A statement is libelous per se if it falsely imputes (1) the commission of a criminal offense; or (2) an infection

with a communicable disease, if true, would exclude one from society; or (3), inability to perform or want of integrity in the discharge of duties of office or employment; or (4) such as to prejudice a particular person in his profession or trade. Richardson v. Dunbar, 95 Ill. App. 3d 254, 259, 419 N. E. 2d 1205 (1981).

According to the plaintiff the fourth category is here, namely words that prejudice a particular person in the conduct of his profession or trade.

Alternatively the plaintiff argues the complaint sufficiently states a claim of libel per quod. Whether the plaintiff's complaint sufficiently pleads libel per se or per quod is not material, for it is deficient on a more fundamental ground. The words simply are not defamatory.

Dismissal of a complaint for libel is warranted if the words claimed to be defamatory are not reasonably or fairly capable of the meaning assigned to them by the plaintiff. Allen v. Ali, 105 Ill. App. 3d 887, 435 N. E. 2d 167 (1982).

It is for the court to decide in the first instance whether the alleged defamatory statements were reasonably capable of the meaning ascribed to them. Compare Richardson, 93 Ill. App. 3d 254, 419 N. E. 2d 1205 (1981) and Allen v. Ali, 105 Ill. App. 3d 887, 435 N. E. 2d 167 (1982).

Further, the principles as set forth in the application of the innocent construction rule are pertinent here. "[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if as so construed, the statement may reasonably

be innocently interpreted . . . it cannot be actionable per se." Chapski v. Copley Press, 92 Ill. 2d 344, 352, 442 N. E. 2d 195, 199 (1982).

Accordingly the court finds that the statements in the broadcast are not fairly and reasonably capable of the construction placed on them by the plaintiff, but rather plaintiff's construction is unreasonable. Compare Allen v. Ali, 105 Ill. App. 3d 887, 435 N. E. 2d 167 (1982), Rasky v. Columbia Broadcasting System, Inc., 103 Ill. App. 2d 577, 431 N. E. 2d 1055 (1981), Richardson v. Dunbar, 95 Ill. App. 2d 254, 419 N. E. 2d 1205 (1981) and Bruck v. Cincotta, 56 Ill. App. 3d, 260, 371 N. E. 2d 874 (1977).

The contents of the broadcast, in the context presented here can best be said to be an innocuous presentation regarding two programs for people who

wanted to play the piano for enjoyment, or fun, and not to develop a professional skill.

At worst, the comments of Mrs. Bauer were her opinion of which program exceeded the musical level of the other, and are thus not actionable. See Zaret v. Joliet Park District, 91 Ill. App. 3d 225, 415 N. E. 2d 659 (1980) and Byars v. Kolodziej, 48 Ill. App. 2d 1015, 363 N. E. 2d 628 (1977). Therefore, the plaintiff's complaint is insufficient as a matter of law to state a cause of action for libel.

Additionally, the plaintiff's other alleged claims for relief are dependent upon the plaintiff's ability to state a claim for defamation, and they, too, accordingly fail to state a cause of action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the defendants' motions to

strike and dismiss counts one through six of plaintiff's first amended complaint, as amended, pursuant to Section 2-615, are granted. As this court has found that the statements in the broadcast as viewed under the applicable principles are not defamatory, the motions to strike and dismiss are granted with prejudice, and the first amended complaint, as amended, is dismissed. All parties shall bear their own costs.

ENTER:

/s/ William R. Quinlan
WILLIAM R. QUINLAN
Circuit Judge

Dated: June 23, 1983

ANDERSON: "Along with people who are tuning up their bodies, you'll meet some Chicago area music lovers who are tuning up their pianos and learning how to play them."

WALLACE: "Saloons in the 'Old West' used to have signs that read: 'Don't shoot the piano player, he's doing the best he can.' Well, there's a new market for those signs, and the reason is that all across the nation, adults are doing something they always wanted to do but never had the time for - learn how to play that piano in the family room."

(Picture of Vladimir Horowitz playing the piano)

WALLACE: "No, this man doesn't take lessons. He's Vladimir Horowitz. He is to the private pianist as Jack Nicklaus is to the Saturday golfers. And it's much in that vein that adults are

flocking to the piano bench these days, not to become a Horowitz or a Brubeck but simply to have fun.

"And one of the best ways to have fun taking lessons is with a group. How, you ask, can you learn piano with a roomful of other students banging away on the keyboard?

"Well, at the Northwestern University Music School electronic piano lab, it's easy."

(Picture of Jane McGraw speaking)

JANE McGRAW: "With these buttons, I can tune in and hear everyone in the class at once. I can hear just one person playing at once or I can fix it so that they can hear me and I can't hear them so they can try out what I'm talking about."

WALLACE: "Instructor Jane McGraw teaches a 10 week program in beginning piano for adults. It costs $80 and is open to the public.

"The night we visited the class, students were busy at work on a simplified verion of Brahm's "Lullaby'.

"Instructor McGraw says her goal is to offer a balanced program that includes sight reading and understanding a basic musical principle. Does she expect to turn out a Horowitz?"

McGRAW: "No, this is purely for fun, but if one is developed at this point, I would make sure they knew it, the teacher."

WALLACE: "Among the students is Jerome Cohens, a Professor of Engineering who says his musical goals are at this point modest, but practical."

(Picture of Jerome Cohens speaking)

COHENS: "My goal is at Christmas parties, to be the guy they bring the drinks to."

WALLACE: "Scott Myers works in a Chem-Lab at Northwestern. He's had music lessons before on the clarinet, so he knows the difference between studying individually and with a group."

(Music in background - Picture of Scott Myers speaking)

MYERS: "You can have one-on-one instructions and yet, whenever the teacher chooses, you can hear how everybody else is doing and compare yourself."

WALLACE: "Marsha Mataval is a late comer to piano lessons, even though her family has had a piano for some time. Daughter, Sarina, is several years ahead of her at the keyboard and now Mom would like to catch up."

(Picture of Marsha Mataval speaking)

MATAVAL: "I'd like to be able to play some duets with my daughter and share the musical experience with her. That would be nice."

SARINA: "She doesn't practice too often and when she does practice, she tells me and my dad to keep quiet and now we don't have any fun."

(Laughter)

WALLACE: "The Northwestern program does stress practice. Francis Larrimer, Head of piano instruction of the school, says they're really are no shortcuts around it."

(Picture of Francis Larrimer speaking)

LARRIMER: "Playing a musical instrument, is very much like athletics. It requires a great deal of physical coordination and in order to develop facilities, one must work at it daily."

(Picture of Fine Arts Building)

WALLACE: "Not every music instruction program emphasizes practice however. In fact, for many, that's one of the most

attractive aspects of Music Dynamics, nationwide piano school run by Paul Renard, who likens himself to Evelyn Wood, the high (inaudible) of speed reading.

"Renard's program of instruction is just that, he says. Programmed learning, which teaches students to sight read music without learning notes or scales. It's more like learning to type, he says. Renard explained part of his system to Harry Porterfield."

(Picture of Paul Renard speaking and demonstrating to Harry Porterfield.)

RENARD: "What the note's name is, is not important - only where - because we're looking for a location. So, that what we do here, in our picture, it's what we call intervals or distance between notes.

"You as a violinist know those because a violinist has to use them, as

does a trombonist or a cellist. So, the interval becomes the distance between two notes and we teach the individual to see these differences. So, for instance, these notes here would go; (DEMONSTRATES) D, 2nd, 2nd, 2nd. (MUSIC) And this would be 2nd again. It's the distance from note to note."

WALLACE: "Renard's system also incorporates something called Picture, Pulse and Anchor, which he says will enable a student to play simple tunes in as few as seven hours. The key to it all, he explains, is starting simply and proceeding gradually."

RENARD: "It's like anything else. It's a cinch by the inch, and hard by the yard, and we prefer to go slowly and give them a chance to get used to things. And it's not hard to do. For most people, it's only hard to accept that it might be easy."

(Music in Background)

WALLACE: "Renard's lessons cost $12 an hour. He and his teaching staff see hundreds of students a week in Chicago alone. Most are adults like Peggy Ryan of Woodridge, an accountant with CNA Insurance. She started organ lessons with Music Dynamics two years ago, and believes she's made a lot of progress."

(Picture of Peggy Ryan playing the Berceuse from the opera "Joslyn")

RYAN: "I'm saying that my husband never listened to my organ playing when I first started. I used to put his headphones on his stereo and now he sits down in the chair and listens to me when I play. So, I feel I must have improved."

WALLACE: "Gaylon Sprimont is a 48 year old real estate salesman from Chicago. He's studied organ at Music Dynamics for three years. A year ago, he took up the piano too."

(Picture of Sprimont playing the Clementi Sonatina No. 1)

SPRIMONT: "I wanted a shortcut. I didn't want to do the scales and spending in labor or practicing at home. I didn't have time for it. So, I began three years ago on the organ with Paul and it's been very rewarding. It's exactly what I've been looking for.

WALLACE: "After hearing students from Music Dynamics and from Northwestern play, we wondered which program might be the better for someone anxious to learn to play for fun, but also well. Sally Bower [sic] is an Assistant Professor of Piano at Roosevelt University's Chicago Musical College. We showed her tapes of students from both Music Dynamics and Northwestern's Beginning Adult Class."

BAUER: "From the tapes that we have seen of those two programs, they're with-

out question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern.

WALLACE: "Mrs. Bower [sic] emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While, a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. She began with Renard 12 years ago at age 68, after another piano instructor told her she was too old for lessons. Today at 80, her playing brings enjoyment to her and to her friends."

(Picture of Pauline Archias playing the theme from Dr. Zhivago)

ARCHIAS: "I have them -- my ladies group over at my house, they like to come to my place because I play the organ for them."

WALLACE: "That's one of the things Mrs. Archias says her lessons have brought her. But, she places even more emphasis one something else."

ARCHIAS: "My family is so proud of me."

ANDERSON: "So, how do you pick a good piano teacher? Experts we've talked with said go to an established college or school and attend a student recital.

"If the students play well, they probably have good teachers.

"Our expert said, 'don't automatically sign up for lessons at the store where you bought your piano, and don't pick a teacher just because he or she lives near you.'"

WALLACE: "If possible, select an instructor who belongs to the Illinois State Music Teachers Association. That membership is usually an assurance of quality. As for cost, expect to pay $12 to $50 an hour or so.

"Good luck, and kids, don't shoot the piano player, Mom and Dad are doing the best they can!"

No. 83-1798

In the

APPELLATE COURT OF ILLINOIS

First Judicial District

Second Division
August 7, 1985

PAUL RENARD, Plaintiff-Appellant v. COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER, Defendants-Appellees	Appeal from the Circuit Court of Cook County Honorable William R. Quinlan Judge Presiding

JUSTICE STAMOS delivered the opinion of the court:

This is an action for libel, conspiracy to libel, malicious injury to

property rights and conspiracy to maliciously injure property rights against all of the defendants, and for fraud and conspiracy to defraud against defendants Columbia Broadcasting System, Inc.; CBS Inc.; Harry Porterfield and James Hatfield. The trial court granted defendants' motion to dismiss plaintiff's amended complaint, finding that plaintiff had failed to state a cause of action under section 2-615 of the Illinois Code of Civil Procedure. (Ill. Rev. Stat. 1979, ch. 110, par. 2-615.) Plaintiff appeals.

The instant case arose from a broadcast by defendants on April 13, 1980, of a public interest program entitled "Two on Two," which contained a segment describing plaintiff's "Music Dynamics" piano program and a 10-week Northwestern University beginning piano course. Plaintiff's program differs from the Northwest-

ern program in that plaintiff teaches students to read and play music by responding to the numerical distances between notes, while the Northwestern course teaches through traditional methods. The stated purpose of the "Two on Two" segment was to examine beginning piano courses for adults who wished to attain a moderate level of skill in playing that instrument. Instructors and students from each school were interviewed and students were filmed while practicing. The Northwestern students were shown playing a simplified, rehearsed piece while plaintiff's students were shown playing complex pieces at first sight. The television audience was not informed of the different circumstances under which the students from the two school were performing.

"Two on Two" concluded the segment by showing the tapes of the students to defendant Sally Bauer, an Assistant Professor of piano from Roosevelt University, and asking her opinion as to which program would be better for an adult who wishes to attain a moderate level of skill in playing the piano. Mrs. Bauer responded:

> "from the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern."

The "Two on Two" commentator then stated:

"Mrs. Bauer emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianchip, Mrs. Pauline Archias is quite satisfied. She began with Renard twelve years ago at age 68 after another piano instructor told her she was too old for lessons. Today, at 80, her playing brings enjoyment to her and her friends."

The segment concluded with advice on choosing a piano teacher, the commentators stating:

"Experts we've talked with said go to an established college or school and attend a student

> recital. If the students play well, they probably have good teachers. Our expert said, 'don't automatically sign up for lessons at the store where you bought your piano, and don't pick a teacher just because he or she lives near you.'
>
> "If possible, select an instructor who belongs to the Illinois State Music Teachers Association. The membership is usually an assurance of quality."

Plaintiff filed suit for libel, conspiracy to libel, malicious injury to property rights, conspiracy to injure property rights, fraud and conspiracy to defraud, alleging a conspiracy by defendants CBS and Roosevelt University and their employees and subsidiaries to injure plaintiff's reputation in order to bene-

fit Roosevelt's music school and CBS's subsidiaries' sales of pianos and electronic organs. Defendants moved to dismiss plaintiff's original complaint and their motion was granted on October 4, 1982. Plaintiff thereafter filed an amended complaint and amendments thereto. Defendants again moved to dismiss under section 2-615 of the Code of Civil Procecure, and the trial court granted the motion with prejudice, finding that plaintiff's complaint failed to state a cause of action. Plaintiff appeals.

The trial court dismissed plaintiff's amended complaint because it was insufficient as a matter of law to state a claim for libel and was therefore insufficient to state a claim for malicious injury to property rights, fraud or conspiracy. Plaintiff contends on appeal that his complaint adequately pleads

libel per se. Words are considered libelous per se if they are so obviously and naturally hurtful that proof of injury is necessary. (See Colson v. Stieg (1980), 86 Ill. App. 3d 993, 995, 408 N. E. 2d red, aff'd (1982), 89 Ill. 2d 205, 433 N. E. 2d 246.) The four categories of statements considered defamatory per se are set out in Richardson v. Dunbar (1981), 95 Ill. App. 3d 254, 419 N. E. 2d 1205. According to plaintiff, the fourth category is applicable here: words that prejudice a particular person in the conduct of his profession or trade. See 95 Ill. App. 3d 254, 259.

Alternatively, plaintiff contends that his complaint sufficiently states a claim of libel per quod, a theory under which the plaintiff must prove an innuendo and allege special damages. (See Bruck v. Cincotta (1977), 56 Ill. App. 3d 260,

264, 371 N. E. 2d 874; see also Richardson v. Dunbar (1981), 95 Ill. App. 3d 254, 260, 419 N. E. 2d 1205.) We need not decide the question of whether this allegation sufficiently pleads libel per se or per quod because plaintiff's complaint is deficient on a more fundamental level; the words are not defamatory.

An exhaustive review of the law of defamation, particularly the innocent construction rule, was undertaken by our supreme court in Chapski v. The Copley Press (1982), 92 Ill. 2d 344, 442 N. E. 2d 195. There the court concluded:

> "[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently

> interpreted...it cannot be actionable per se. This preliminary determination is properly a question of law to be resolved by the court in the first instance." 92 Ill. 2d 344, 352.

It is clear that the circuit court correctly determined as a matter of law that the "Two on Two" segment featuring plaintiff's music school was not defamatory. The segment merely examined two beginning piano courses and elicted an informal opinion from a third party as to the merits of each; it contained no false statements of fact injurious to plaintiff's reputation. Furthermore, the trial court correctly held that the comments of Mrs. Bauer were, under any reasonable construction, merely her opinion as to the merits of the two music programs featured

in the broadcast and thus were not actionable. See Zaret v. Joliet Park District (1980), 91 Ill. App. 2d 225, 227, 415 N. E. 2d 659.

Because the remaining counts of plaintiff's amended complaint are dependent upon plaintiff's ability to state a claim for defamation, the trial court correctly held that these counts also failed to state a cause of action. Dismissal of a complaint for failure to state a cause of action is a matter within the discretion of the trial court. This rule applies to actions for defamatory damages. Antonelli v. Field Enterprises, Inc. (1983), 115 Ill. App. 3rd, 432, 436, 450 N. E. 2d 876.

Plaintiff argues that Illinois' innocent construction rule is violative of due process and equal protection under the Federal and Illinois constitutions.

This argument is clearly without merit, as the only authority cited by plaintiff in support of this contention is MacLeod v. Tribune Publishing Co. (1959), 52 Cal. 2d 536, 343 P. 2d 36, which condemns the same type of hair-splitting innocent construction decisions cited by our supreme court as the reason for its revision of the innocent construction rule in Chapski. Plaintiff's argument that suitors denied recovery for statements which can reasonably be innocently construed are denied equal protection and due process of law is unsupported by any authority and contradicts our supreme court's decision in Chapski.

Plaintiff next contends that the trial court erred in finding that his amended complaint failed to state a cause of action for fraud. Plaintiff's complaint alleged that defendants induced

him to allow them to photograph and interview him and his students by fraudulently representing to plaintiff that the "Two on Two" segment would feature his music school exclusively.

Among the elements necessary for recovery for fraud is an injury caused by one party's reliance on the false representations of another. (See Younger v. Revelle (1979), 78 Ill. App. 3d 1, 4, 397 N. E. 2d 221.) We have previously determined that the trial court correctly held that plaintiff has not been defamed in the instant case. Therefore, plaintiff has suffered no injury as the result of any representations made by defendants and has not stated a cause of action for fraud or for conspiracy to defraud.

Plaintiff finally contends that the simultaneous representation by the same counsel of defendant Bauer and the remain-

ing defendants is a prohibited conflict of interest and that the trial court erred in failing to take action to eliminate this conflict. Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice. "Only a party who sustains a relation of client to an attorney who undertakes to represent conflicting interests may be entitled to object to such representation." Murchison v. Kirby (S.D.N.Y. 1961), 201 F. Supp. 122, 123-24 quoting 7 C.J.S. Attorney and Client §47, p. 827.

For the reasons expressed above, the decision of the circuit court is affirmed.

Affirmed.

Hartman, PJ., and Downing, J., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

November 30, 1984

Mr. Arnold Rubin
Attorney at Law
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Chicago, IL 60605

No. 60771 - Paul Renard, petitioner, v. Columbia Broadcasting System, Inc., etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on December 21, 1984.

(2)

No. 84-1378

Office-Supreme Court, U.S.
FILED
APR 25 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF OF RESPONDENTS COLUMBIA BROADCASTING SYSTEM, INC., CBS INC., SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decisions of the courts below, dismissing Petitioner's amended complaint for failure to state a cause of action, and affirming that dismissal, based completely on dispositive state law issues, rest upon adequate, independent non-federal grounds.

2. Whether Petitioner's contentions that the trial court's dismissal of his action and the appellate court's affirmance of that dismissal violated his due process rights or denied him equal protection of the laws are frivolous.

IDENTIFICATION OF PARTIES PURSUANT TO SUPREME COURT RULES 28.1 AND 34.2

Petitioner is Paul Renard, an Illinois citizen. Respondents are Susan Anderson, Robert Wallace, Harry Porterfield, James Hatfield, their employer, CBS Inc., Sally Bauer, and her employer, Roosevelt University.[1] Respondent Columbia Broadcasting System, Inc. is a wholly-owned subsidiary of Respondent CBS Inc. Excluding CBS Inc.'s other wholly-owned subsidiaries, the following companies are subsidiaries or affiliates of CBS Inc.: April Music Publishing Company (Proprietary) Limited; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; N.S. Beaujolais Music, Inc.; N.S. Justinian Music, Inc.; Golden Apple Music, Inc.; CBS Affiliated Catalog Inc.; CBS Feist Catalog Inc.; CBS Hastings Catalog Inc.; CBS Miller Catalog Inc.; CBS Robbins Catalog Inc.; CBS U Catalog Inc.; CBS Unart Catalog Inc.; CBS Variety Catalog Inc.; United Artists Music (Australia) Pty. Limited; United Partnership Limited; United Artists Music (France) S.A.; United Artists Musik GmbH; Phonix Musikverlag GmbH; United Artists Music (Nederland) B.V.; Edizioni Musicali United Artists (Italy) S.r.l.; Resolute Casa Editrice Musicali S.r.l.; United Artists Music Japan Inc.; United Artists Musikforlag AB; United Artists Music (South Africa) Pty. Limited; Grammofonselskabs Distributions Centralen A/S; CBS Epic (Thailand) Limited; CBS Music (Thailand) Limited; CBS/FOX Company, The [General Partnership]; CBS/FOX VIDEO

[1] Roosevelt University is represented by other counsel.

(Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Germany) GmbH; CBS/FOX VIDEO (South Pacific) Pty. Ltd.; CBS/FOX VIDEO (Canada) Ltd.; CBS/FOX VIDEO (Espanola) S.A.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; CBS Electronics Ltd.; Editions CBS Songs S.A.R.L.; CBS/MTM Company [General Partnership]; CBS Records Chile Ltda.; CBS Records (Kenya) Limited; PEC Musiikkitukku OY; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY Inc.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music, Inc. (Japan); CBS/SONY California, Inc.; Digital Audio Disc Corporation; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza, Inc.; SD Hokkaido Inc.; Shorewood Packaging Company Limited; CBS Songs Music Publishing Co. Ltd.; Editora Malograf Ltda.; Melograf S.A.; Fender Japan, Ltd.; Gramophone Record Company (Proprietary) Limited; Ideal Toy Company of Canada, Ltd.; Igaku-Shoin/Saunders Ltd.; Shorewood Packaging Corp. of Canada Limited; Trintex [General Partnership]; and Tri-Star Pictures [General Partnership].

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No. 84-1378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF OF RESPONDENTS COLUMBIA BROADCASTING SYSTEM, INC., CBS INC., SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

The facts are stated in the opinion of the Illinois Appellate Court, a copy of which is annexed hereto as

Appendix "A".[2] The opinion of the Circuit Court of Cook County, Illinois, includes a transcript of the broadcast out of which this action arose; the Circuit Court's opinion and the transcript are annexed hereto as Appendix "B" and "C", respectively. However, because Petitioner's statement of the case is argumentative, distorted and relies on matters outside the factual allegations of the amended complaint, we restate:

This case arises from a portion of the April 13, 1980 broadcast of "Two on Two," a weekly feature news program produced and telecast by WBBM-TV, a Chicago television station owned and operated by Respondent CBS Inc. The topic of the "Two on Two" segment (hereinafter the "broadcast") at issue was playing the piano for fun. (App. C, p. 1.) The broadcast focused on two Chicago area schools that taught piano, and surveyed the students on whether they found piano playing satisfying and fun. The first school shown in the broadcast was the Northwestern University Music School's "electronic piano lab." There, as part of a 10-week piano course, students were seen practicing "a simplified version of Brahms' 'Lullaby.' " The instructor, Joan McGraw, emphasized that the program of instruction was "purely for fun." She said that if a student had developed the potential to become a professional pianist, she would refer the student to a good teacher. (*Id.*, p. 2.) An instructor in the Northwestern program said that the 10-week program there required daily practice. (*Id.*, p. 3.) Three students in the program were interviewed briefly.

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[2] The opinion is published at 126 Ill. App. 3d 563, 467 N.E.2d 1090 (1984).

The broadcast then turned to "Music Dynamics, [a] nationwide piano school, run by [Petitioner] Paul Renard." (*Id.*) Interviewer Bob Wallace, one of the Respondents herein, noted that unlike the Northwestern program, the "Music Dynamics" program did not emphasize daily practice, and that "for many, that's one of the most attractive aspects of Music Dynamics . . . ." (*Id.*)

Renard's program, Wallace said, "teaches students to sight-read music without learning notes or scales." The broadcast included Renard's explanation of how his students learn to play piano—by picturing distances between notes on sheet music, enabling them "to play simple tunes in as few as seven hours." (*Id.*, pp. 3-4.)

Wallace then spoke briefly with three of Renard's students. The first, Peggy Ryan, said that since beginning to learn to play the organ by the "Music Dynamics" method, she had "made a lot of progress." She noted that her husband no longer put on stereo headphones to block out the sound of her playing, "so I feel I must have improved." Gaylon Sprimont, a real estate salesman, said he found the "Music Dynamics" course "very rewarding" and "exactly what I've been looking for." Sprimont said the course was ideal for him, because he did not have time to practice at home. A third student, 80 year-old Pauline Archias, was said to be "quite satisfied" with Renard's program, since her musical skills encouraged friends to visit her to hear her play the organ. "My family is so proud of me," she added. (*Id.*, pp. 4-6.)

Near the end of the broadcast, Wallace spoke briefly with Sally Bauer, one of the Respondents herein and an assistant professor of piano at Roosevelt University. Wallace said "Two on Two" consulted Mrs. Bauer because "we wondered which program might be the better for someone anxious to learn to play for fun, but also play

well." (*Id.*, p. 5.) Wallace said Mrs. Bauer was shown tapes of students from both the Music Dynamics and Northwestern music classes. Her brief comments were:

> From the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern. (*Id.*)

Wallace then continued:

> Mrs. Bower [sic] emphasized that the best way to judge any program is by whether it helps the student to learn to play as well as he or she wants to learn. While, a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. (*Id.*)

Mrs. Archias' glowing comments, described above, were then shown. The broadcast concluded, humorously: "Good luck, and kids, don't shoot the piano player, Mom and Dad are doing the best they can!" (*Id.*, p. 6.)

Petitioner's amended complaint purported to claim libel, conspiracy to libel, malicious injury to property rights, conspiracy to maliciously injure property rights, fraud and conspiracy to defraud. (App. A, p. 1; App. B, p. 2.) The Circuit Court of Cook County granted Respondents' motions to dismiss the amended complaint on June 23, 1983; Petitioner elected to stand on his amended complaint and appealed the dismissal. On August 7, 1984, the Illinois Appellate Court affirmed and the Illinois Supreme Court denied leave to appeal on November 30, 1984.

REASONS TO DENY THE WRIT

SUMMARY OF ARGUMENT

The decisions of the Illinois courts challenged by Petitioner here are supported by adequate, independent state grounds. Moreover, Petitioner's frivolous claims that he suffered a denial of due process or equal protection of the laws are transparent attempts to transform exclusive state law determinations into federal questions.

THE DECISIONS BELOW REST ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS AND THE PETITION FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Petition for Writ of Certiorari should be denied because the decisions below rest on adequate and independent state law grounds and because the Petition presents no substantial federal question. Petitioner's amended complaint attempted to allege the state law torts of libel, malicious injury to property rights, fraud and conspiracy, all of which are governed solely by Illinois law. The trial court ruled that Petitioner had failed to state a cause of action under Illinois law and held, basing its decision dismissing the amended complaint on alternative grounds, that the statements made in the broadcast were not defamatory; that the words claimed to be defamatory were not reasonably or fairly capable of the meaning assigned to them by Petitioner; that not only were the words used *capable* of an innocent construction, under Illinois law, but Petitioner's construction of them was *unreasonable*; and that, in any event, the allegedly offensive comments were nonactionable statements of opinion. (App. B, pp. 3-5.)

In examining the allegations of Petitioner's amended complaint and the language used in the broadcast, the Illinois Appellate Court held (App. A, p. 4): "We need not decide whether this allegation sufficiently pleads libel *per se* or *per quod* because plaintiff's complaint is deficient on a more fundamental level; the words are not defamatory." Thus, the Appellate Court ruled that the broadcast was not defamatory, *i.e.*, "it contained no false statements of fact injurious to plaintiff's reputation" (*id.*, p. 5), and that, alternatively, the allegedly defamatory statements were nonactionable expressions of opinion. Both the trial court and the Appellate Court held that Petitioner failed to state a cause of action on his remaining state law claims for malicious injury to property rights, fraud, and "conspiracy" to commit these various torts.

Because Petitioner fails to show that the decisions below were not based on adequate interpretations of state law by the state courts, independent of federal constitutional concerns, the Petition presents no substantial federal question and, accordingly, review by this Court is plainly unwarranted. *E.g.*, *Michigan v. Long*, 103 S. Ct. 3469, 3476 (1983); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. 590, 629 (1875). Moreover, the mere incantation of a federal constitutional question is insufficient to invoke this Court's jurisdiction unless the question is substantial. *E.g.*, *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).[3]

As the discussion below demonstrates, this is a garden-variety libel action in which the lower courts applied well-

[3] The Court's jurisdiction here is nominally under 28 U.S.C. §1257. Petitioner incorrectly claims that the jurisdiction of this Court is invoked by "28 U.S.C. §2101(3)." (Petition, p. 2.)

established legal standards in determining that Petitioner's state law claims lacked substance. The Petition raises no substantial federal question and there is nothing in the circumstances of the broadcast, its language, its context, the lower courts' rulings or the state of Illinois law which even remotely commend this case for review by this Court.

1. The Lower Courts Properly Determined, As A Matter Of State Law, That The Language At Issue Is Not Defamatory.

Petitioner's chanting of the words "due process" and "equal protection" in criticizing the lower courts' analysis of the broadcast misapprehends the Illinois law of libel and its application in the case at bar. The lower courts applied the Illinois "innocent construction rule" as an *alternative* basis for dismissing Petitioner's amended complaint—both courts squarely held, prior to applying the rule, that the broadcast simply did not contain a false statement of fact which could be construed, under *any* circumstances, as being injurious to Petitioner's reputation, business or profession. Moreover, the trial court's ruling, affirmed by the Appellate Court, was that not only was it reasonable to construe the language of the broadcast innocently, but that Petitioner's construction was unreasonable. The authority for a court to determine, as a matter of law, whether a challenged publication is susceptible of the defamatory meaning ascribed to it by plaintiff is well-established. *See, e.g., Frinzi v. Hanson*, 30 Wis. 2d 271, 275-76, 140 N.W.2d 259, 261 (1966); *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837 (1976); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528, 541 (3d Cir. 1979); *Southard v. Forbes*,

Inc., 588 F.2d 140, 143 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Hallmark Builders, Inc. v. Gaylord Broadcasting Co.*, 733 F.2d 1461, 1464 (11th Cir. 1984); Restatement (Second) of Torts §614(b) (1977). Thus, the lower courts' decisions rest squarely on adequate and independent state grounds and no constitutional issue is presented in this Court for review.

In any event, the lower courts properly applied the "innocent construction rule" as an alternative ground mandating dismissal of Petitioner's amended complaint. The ground rules by which a broadcast or publication is to be analyzed by Illinois courts in the context of a motion to dismiss were set forth by the Illinois Supreme Court in *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982):

> [A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance . . . .

Illinois courts apply this standard in determining whether a plaintiff has sufficiently alleged that a defendant has uttered a false and defamatory statement of fact—a matter peculiarly within the province of the state court in determining whether a plaintiff has pleaded actionable defamation. Neither the rule, nor its application by the Illinois courts in this case, creates an impermissible classification; charitably characterized, Petitioner's apparent claim that the rule creates an impermissible classification between meritorious and non-meritorious claims fails to present a substantial federal question and

should be summarily rejected. Moreover, Petitioner has no constitutionally protected interest in a jury trial where the court has determined, as a matter of law, that the publication in question does not contain a false and defamatory statement of fact. The rule does not implicate the United States Constitution in any way and, to the extent the rule may be viewed as the predicate for the decisions Petitioner challenges here, it serves as an adequate and independent state ground of decision.

Indeed, the *Chapski* decision itself embodies the Illinois Supreme Court's considered analysis of the interests which the rule is designed to accommodate. After noting the policies underlying the rule[4] and discussing several instances where courts had strained to find innocent constructions, the Court determined to modify the rule in the manner set forth above on the grounds that the modification

> would better serve to protect the individual's interest in vindicating his good name and reputation, while allowing the first amendment guarantees that "breathing space" essential to their fruitful exercise. (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

Chapski, 92 Ill. 2d at 351-52, 442 N.E.2d at 199. Based on the Illinois Supreme Court's analysis in *Chapski*, the Illinois Appellate Court squarely rejected Petitioner's due process and equal protection arguments. (App. A, pp. 5-6.)[5]

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[4] "Perhaps the strongest reason advanced in support of the rule is that it comports with the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs." Chapski v. Copley Press, 92 Ill. 2d 344, 350, 442 N.E.2d 195, 198 (1982).

[5] While Petitioner's due process and equal protection arguments were presented to and decided by the Illinois Appellate Court, Petitioner has not preserved these issues for review by this Court

(Footnote continued on following page)

Thus, the "innocent construction" rule was properly applied by the lower courts and its application raises no issue cognizable in this Court.

2. The Dismissal Of Petitioner's Claims For Fraud, Malicious Injury To Property Rights And Conspiracy Presents No Issue Cognizable In This Court.

So well-grounded in Illinois law is the dismissal of Petitioner's claims for fraud, malicious injury to property rights and conspiracy, that the best Petitioner can say in support of those claims is to characterize the state courts' interpretation of the facts and their application of state law to those facts as "arbitrary and capricious." This characterization is wholly insufficient to transform these exclusive state law determinations into substantial federal questions subject to review by this Court. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of*

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[5] *continued*
because he failed to include them in his "Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal" filed with the Illinois Supreme Court; the innocent construction rule is not mentioned and the *Chapski* decision is not even cited. (Under separate cover, Respondents have lodged with this Court a certified copy of the "Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal.") In failing to present or argue these issues in his Petition to the Illinois Supreme Court, we submit, Petitioner has not presented these issues to the highest court in the state in which a decision could be had. The issues have therefore been waived and this Court should deny the writ. Matthews v. Huwe, 269 U.S. 262, 265-66 (1925) (failure to apply for discretionary review in state supreme court); Ill. Rev. Stat. ch. 110A, §§315(b)(3), 315(g), 341(e)(7) (issues not argued are waived under Illinois Supreme Court Rules); Beck v. Washington, 369 U.S. 541, 552-53 (1962) (failure to follow state court rules regarding presentation of issues is grounds to deny certiorari); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945) (Supreme Court lacked jurisdiction to hear federal question improperly presented to state supreme court under state practice rules).

Memphis, 87 U.S. 590, 629 (1875) ("merely *raising*" federal question is insufficient) (emphasis in original).

3. The Lower Courts' Holdings With Respect To Opinion And The Dismissal Of Petitioner's Claims For Fraud, Malicious Injury To Property Rights And Conspiracy Are Neither "Arbitrary" Nor "Capricious."

Petitioner's talismanic use of the words "arbitrary" and "capricious" fails to raise the lower courts' findings on the issue of opinion to an issue of constitutional magnitude. As clearly stated by both lower courts, their holdings that the allegedly offending words were nonactionable statements of opinion were *alternative* grounds, mandating, in the case of the trial court, dismissal of the amended complaint, and, in the case of the Appellate Court, affirmance. Moreover, there is nothing "arbitrary" or "capricious" about the Appellate Court's ruling.

Signally, in *American Railway Express Co. v. Kentucky*, 273 U.S. 269 (1927), the only case upon which Petitioner relies in support of his contentions in Points II and III of his Petition that the rulings of the lower courts were arbitrary and capricious, this Court rejected a similar claim:

> The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the state courts upon questions of state law.

Id. at 272-273 (*quoting Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917)). The Court further noted that:

> It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial conduct does not deprive the unsuccessful party of property without due process of law.

American Railway Express Co., 273 U.S. at 273.

In the case at bar, the lower courts simply determined, based on well-established legal standards, that Petitioner had failed to meet his threshold burden of alleging a false and defamatory statement of *fact*, as opposed to opinion. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980); *Spelson v. CBS Inc.*, 581 F. Supp. 1195, 1202-1205 (N.D. Ill. 1984); *Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (1982).[6] Moreover, the trial court's dismissal of Petitioner's claims for fraud, malicious injury to property rights and "conspiracy," and the Appellate Court's affirmance, were based exclusively on Illinois law, were rendered in the regular course of judicial conduct, and provide no basis for a claim of an "arbitrary and capricious" exercise of power. *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927). These holdings, we submit, were correct; however, even if they were erroneous, which we submit is not the case, the actions of the lower courts were not so bizarre or unusual as to constitute the "arbitrary and capricious" exercise of judicial power.[7]

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[6] The fair comment privilege, to which Petitioner addresses the bulk of his arguments in Point II of his Petition, was neither raised by Respondents nor decided by the trial or appellate courts. Thus, Petitioner's gratuitous gibes are not properly before the Court. In addition, Petitioner's "false implication rule" is a doctrine with which neither Respondents nor, insofar as we can determine, Illinois jurisprudence are familiar.

[7] As demonstrated in Petitioner's statement regarding the "Raising of Federal Questions in the Appellate Court of Illinois, First Judicial District" (Petition, pp. 16-19), Petitioner did not raise in the Appellate Court an issue with respect to an "arbitrary" or "capricious" exercise of power by the trial court regarding its ruling on opinion or its dismissal of Petitioner's state law claims for

(Footnote continued on following page)

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(Counsel of Record)
JAMES R. DALY

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April 25, 1985

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[7] *continued*
fraud, malicious injury to property rights and "conspiracy." Similarly, Petitioner failed to raise these issues in his Petition for Leave to Appeal to the Illinois Supreme Court with respect to the actions of the Appellate Court. The only "constitutional" issue with respect to opinion raised by Petitioner in the Illinois Supreme Court was "whether the fair comment rule is void as being in violation of the First Amendment to the United States Constitution." (Illinois Supreme Court Petition, p. 24, lodged herewith under separate cover.) As noted earlier, however, Respondents never claimed the fair comment privilege and the issue was not decided by any of the lower courts. This Court should decline jurisdiction for this additional reason.

APPENDICES

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APPENDIX A

ILLINOIS APPELLATE COURT OPINION

83-1798

Second Division
August 7, 1984

PAUL RENARD,

Plaintiff-Appellant,

v.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
Honorable **William R. Quinlan**, Judge Presiding.

JUSTICE STAMOS delivered the opinion of the court:

This is an action for libel, conspiracy to libel, malicious injury to property rights and conspiracy to maliciously injure property rights against all of the defendants, and for fraud and conspiracy to defraud against defendants Columbia Broadcasting System, Inc.; CBS Inc.; Harry Porterfield and James Hatfield. The trial court granted defendants' motion to dismiss plaintiff's amended complaint, finding that plaintiff had failed to state a cause of action under

section 2-615 of the Illinois Code of Civil Procedure. (Ill. Rev. Stat. 1979, ch. 110, par. 2-615.) Plaintiff appeals.

The instant case arose from the broadcast by defendants on April 13, 1980, of a public interest program entitled "Two on Two," which contained a segment describing plaintiff's "Music Dynamics" piano program and a 10-week Northwestern University beginning piano course. Plaintiff's program differs from the Northwestern program in that plaintiff teaches students to read and play music by responding to the numerical distances between notes, while the Northwestern course teaches through traditional methods. The stated purpose of the "Two on Two" segment was to examine beginning piano courses for adults who wished to attain a moderate level of skill in playing that instrument. Instructors and students from each school were interviewed and students were filmed while practicing. The Northwestern students were shown playing a simplified, rehearsed piece while plaintiff's students were shown playing complex pieces at first sight. The television audience was not informed of the different circumstances under which the students from the two schools were performing.

"Two on Two" concluded the segment by showing the tapes of the students to defendant Sally Bauer, an Assistant Professor of piano from Roosevelt University, and asking her opinion as to which program would be better for an adult who wished to attain a moderate level of skill in playing the piano. Mrs. Bauer responded:

> "from the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern."

The "Two on Two" commentator then stated:

> "Mrs. Bauer emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. She began with Renard twelve years ago at age 68 after another piano instructor told her she was too old for lessons. Today, at 80, her playing brings enjoyment to her and her friends.

The segment concluded with advice on choosing a piano teacher, the commentators stating:

> "Experts we've talked with said go to an established college or school and attend a student recital. If the students play well, they probably have good teachers. Our expert said. 'don't automatically sign up for lessons at the store where you bought your piano, and don't pick a teacher just because he or she lives near you.'
>
> "If possible, select an instructor who belongs to the Illinois State Music Teachers Association. The membership is usually an assurance of quality."

Plaintiff filed a suit for libel, conspiracy to libel, malicious injury to property rights, conspiracy to injure property rights, fraud and conspiracy to defraud, alleging a conspiracy by defendants CBS and Roosevelt University and their employees and subsidiaries to injure plaintiff's reputation in order to benefit Roosevelt's music school and CBS's subsidiaries' sales of pianos and electronic organs. Defendants moved to dismiss plaintiff's original complaint and their motion was granted on October 4, 1982. Plaintiff thereafter filed an amended complaint and amendments thereto. Defendants again moved to dismiss under section 2-615 of the Code of Civil Procedure, and the trial court granted the motion with prejudice, finding that

plaintiff's complaint failed to state a cause of action. Plaintiff appeals.

The trial court dismissed plaintiff's amended complaint because it was insufficient as a matter of law to state a claim for libel and was therefore insufficient to state a claim for malicious injury to property rights, fraud or conspiracy. Plaintiff contends on appeal that his complaint adequately pleads libel *per se*. Words are considered libelous *per se* if they are so obviously and naturally hurtful that proof of injury is necessary. (See *Colson v. Stieg* (1980), 86 Ill. App. 3d 993, 995, 408 N.E.2d 431, *aff'd* (1982), 89 Ill. 2d 205, 433 N.E.2d 246.) The four categories of statements considered defamatory *per se* are set out in *Richardson v. Dunbar* (1981), 95 Ill. App. 3d 254, 419 N.E.2d 1205. According to plaintiff, the fourth category is applicable here: words that prejudice a particular person in the conduct of his profession or trade. See 95 Ill. App. 3d 254, 259.

Alternatively, plaintiff contends that his complaint sufficiently states a claim of libel *per quod*, a theory under which the plaintiff must prove an innuendo and allege special damages. (See *Bruck v. Cincotta* (1977), 56 Ill. App. 3d 260, 264, 371 N.E.2d 874; see also *Richardson v. Dunbar* (1981), 95 Ill. App. 3d 254, 260, 419 N.E.2d 1205.) We need not decide the question of whether this allegation sufficiently pleads libel *per se* or *per quod* because plaintiff's complaint is deficient on a more fundamental level; the words are not defamatory.

An exhaustive review of the law of defamation, particularly the innocent construction rule, was undertaken by our supreme court in *Chapski v. The Copley Press* (1982), 92 Ill. 2d 344, 442 N.E.2d 195. There the court concluded:

> "[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted . . . it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance." 92 Ill. 2d 344, 352.

It is clear that the circuit court correctly determined as a matter of law that the "Two on Two" segment featuring plaintiff's music school was not defamatory. The segment merely examined two beginning piano courses and elicited an informal opinion from a third party as to the merits of each; it contained no false statemens of fact injurious to plaintiff's reputation. Furthermore, the trial court correctly held that the comments of Mrs. Bauer were, under any reasonable construction, merely her opinion as to the merits of the two music programs featured in the broadcast and thus were not actionable. See *Zaret v. Joliet Park District* (1980), 91 Ill. App. 3d 225, 227, 415 N.E.2d 659.

Because the remaining counts of plaintiff's amended complaint are dependent upon plaintiff's ability to state a claim for defamation, the trial court correctly held that these counts also failed to state a cause of action. Dismissal of a complaint for failure to state a cause of action is a matter within the discretion of the trial court. This rule applies equally to actions for defamatory damages. *Antonelli v. Field Enterprises, Inc.* (1983), 115 Ill. App. 3d 432, 436, 450 N.E.2d 876.

Plaintiff argues that Illinois' innocent construction rule is violative of due process and equal protection under the Federal and Illinois constitutions. This argument is clearly without merit, as the only authority cited by plaintiff in

support of this contention is *MacLeod v. Tribune Publishing Co.* (1959), 52 Cal. 2d 536, 343 P.2d 36, which condemns the same type of hair-splitting innocent construction decisions cited by our supreme court as the reason for its revision of the innocent construction rule in *Chapski.* Plaintiff's argument that suitors denied recovery for statements which can reasonably be innocently construed are denied equal protection and due process of law is unsupported by any authority and contradicts our supreme court's decision in *Chapski.*

Plaintiff next contends that the trial court erred in finding that his amended complaint failed to state a cause of action for fraud. Plaintiff's complaint alleged that defendants induced him to allow them to photograph and interview him and his students by fraudulently representing to plaintiff that the "Two on Two" segment would feature his music school exclusively.

Among the elements necessary for recovery for fraud is an injury caused by one party's reliance on the false representations of another. (See *Younger v. Revelle* (1979), 78 Ill. App. 3d 1, 4, 397 N.E. 2d 221.) We have previously determined that the trial court correctly held that plaintiff has not been defamed in the instant case. Therefore, plaintiff has suffered no injury as the result of any representations made by defendants and has not stated a cause of action for fraud or for conspiracy to defraud.

Plaintiff finally contends that the simultaneous representation by the same counsel of defendant Bauer and the remaining defendants is a prohibited conflict of interest and that the trial court erred in failing to take action to eliminate this conflict. Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice.

"Only a party who sustains a relation of client to an attorney who undertakes to represent conflicting interests may be entitled to object to such representation." *Murchison v. Kirby* (S.D.N.Y. 1961), 201 F. Supp. 122, 123-24 quoting 7 C.J.S. Attorney and Client §47, p. 827.

For the reasons expressed above, the decision of the circuit court is affirmed.

Affirmed.

Hartman, PJ., and Downing, J., concur.

APPENDIX B

CIRCUIT COURT OF COOK COUNTY'S ORDER

No. 81 L 8289

PAUL RENARD,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., et al.,

Defendants.

ORDER

This matter comes on to be heard on the motion of the defendants, CBS Inc., Columbia Broadcasting System, Inc., Susan Anderson, and other named individual defendants, to dismiss plaintiff's first amended complaint, as amended, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, Illinois Revised Statutes, Chapter 110, Section 2-615.

The defendant, Roosevelt University, has also filed a motion to strike and dismiss pursuant to Section 2-615.

The court has heard the oral arguments of counsel, considered the memoranda submitted by the parties, and is duly advised in the premises.

Plaintiff has filed a six count complaint complaining of a "Two on Two" broadcast, which plaintiff asserts caused him to be libeled by the defendants.

The specific arguments of the defendant, Roosevelt University, will not be addressed inasmuch as the resolution of the contention of the defendants CBS Inc., et al., necessarily resolves the issues as they relate to Roosevelt.

The first amended complaint, as amended (hereinafter sometimes referred to as "the complaint") as characterized by the plaintiff, is for libel, conspiracy to libel, malicious injury to property rights, and conspiracy to maliciously injure property rights against all defendants; and in addition for fraud and conspiracy to defraud against the defendants, CBS Inc., et al.

The gist of the plaintiff's complaint leading to the six count complaint is that the "Two on Two" broadcast was understood by its viewers to mean as set forth in paragraph 13 of the first amended complaint, as amended that the plaintiff and his school "were so completely lacking in knowledge, competence, and ability in connection with the teaching of the playing of the piano, and organ, and in the selection and use of teaching programs, materials and equipment in connection with such teaching, that it would be better for someone anxious to learn to play the piano or organ for fun, but also to play well, to merely take a ten week program in beginning piano for adults at Northwestern University rather than taking lessons from the plaintiff and his staff at his school for as long as two or three years, since adults who had taken lessons in the playing of the piano and organ from the plaintiff and his teaching staff at his school for two or three years, after such time still might sound a bit mechanical and lack complete musicianship, still has not reached a musical level equal to that in a ten week program in beginning piano for adults at Northwestern University, and still did not even have as much independence musically as the

works of students in the said Northwestern University program." Further, that these statements were false.

The plaintiff alleges that the broadcast was thus libelous per se, constituted libel per quod, that the opinions expressed on the program were not privileged, and that the program could not be innocently construed.

Attached to this order as Appendix A is a copy of the broadcast as is set forth in paragraph 13 of plaintiff's first amended complaint, as amended.

The defendants assert that the broadcast is neither libelous per se, libel per quod, or otherwise actionable, but merely an expression of opinion, and also non-actionable under the innocent construction rule.

Inasmuch as the other allegations are all inextricably intertwined with the libel allegations, the defendants contend that they, too, must fail.

To state a claim for libel, statements, or in this case the broadcast, must in the first instance be defamatory.

Defamatory statements are either libelous per se or per quod. *Bruck v. Cincotta*, 56 Ill.App.3d 260, 371 N.E.2d 874 (1977).

Words in a publication are considered libelous per se if they are so obviously and naturally hurtful that proof of injury is unnecessary. *See Springer v. Harwig*, 94 Ill. App.3d 281, 418 N.E.2d 870 (1981).

In that case proof of an injury is dispensed with, and damages are presumed. *Kirk v. Village of Hillcrest*, 31 Ill.App.3d 1063, 335 N.E.2d 535 (1975).

Words are libelous per quod if false, but require an innuendo to give them a libelous meaning, and require evi-

dence to show that as a matter of fact some substantial injury has followed from their use. *Kirk, supra.*

A statement is libelous per se if it falsely imputes (1) the commission of a criminal offense; or (2) an infection with a communicable disease, if true, would exclude one from society; or (3), inability to perform or want of integrity in the discharge of duties of office or employment; or (4) such as to prejudice a particular person in his profession or trade. *Richardson v. Dunbar*, 95 Ill.App.3d 254, 259, 419 N.E.2d 1205 (1981).

According to the plaintiff the fourth category is here, namely words that prejudice a particular person in the conduct of his profession or trade.

Alternatively the plaintiff argues the complaint sufficiently states a claim of libel per quod. Whether the plaintiff's complaint sufficiently pleads libel per se or per quod is not material, for it is deficient on a more fundamental ground. The words simply are not defamatory.

Dismissal of a complaint for libel is warranted if the words claimed to be defamatory are not reasonably or fairly capable of the meaning assigned to them by the plaintiff. *Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982).

It is for the court to decide in the first instance whether the alleged defamatory statements were reasonably capable of the meaning ascribed to them. *Compare Richardson v. Dunbar*, 95 Ill.App.3d 254, 419 N.E.2d 1205 (1981) *and Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982).

Further, the principles as set forth in the application of the innocent construction rule are pertinent here. "[A]

written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if as so construed, the statement may reasonably be innocently interpreted . . . it cannot be actionable per se." *Chapski v. Copley Press*, 92 Ill.2d 344, 352, 442 N.E.2d 195, 199 (1982).

Accordingly the court finds that the statements in the broadcast are not fairly and reasonably capable of the construction placed on them by the plaintiff, but rather plaintiff's construction is unreasonable. *Compare Allen v. Ali*, 105 Ill.App.3d 887, 435 N.E.2d 167 (1982), *Rasky v. Columbia Broadcasting System, Inc.*, 103 Ill.App.3d 577, 431 N.E.2d 1055 (1981), *Richardson v. Dunbar*, 95 Ill.App.3d 254, 419 N.E.2d 1205 (1981) and *Bruck v. Cincotta*, 56 Ill.App.3d 260, 371 N.E.2d 874 (1977).

The contents of the broadcast, in the context presented here can best be said to be an innocuous presentation regarding two programs for people who wanted to play the piano for enjoyment, or fun, and not to develop a professional skill.

At worst, the comments of Mrs. Bauer were her opinion of which program exceeded the musical level of the other, and are thus not actionable. *See Zeret v. Joliet Park District*, 91 Ill.App.3d 225, 415 N.E.2d 659 (1980) and *Byars v. Kolodziej*, 48 Ill.App.3d 1015, 363 N.E.2d 628 (1977). Therefore, the plaintiff's complaint is insufficient as a matter of law to state a cause of action for libel.

Additionally, the plaintiff's other alleged claims for relief are dependent upon the plaintiff's ability to state a claim for defamation, and they, too, accordingly fail to state a cause of action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the defendants' motions to strike and dismiss counts one through six of plaintiff's first amended complaint, as amended, pursuant to Section 2-615, are granted. As this court has found that the statements in the broadcast as viewed under the applicable principles are not defamatory, the motions to strike and dismiss are granted with prejudice, and the first amended complaint, as amended, is dismissed. All parties shall bear their own costs.

ENTER:

/s/ William R. Quinlan
Circuit Judge

Dated: June 23, 1983

APPENDIX C

APPENDIX TO CIRCUIT COURT OF COOK COUNTY'S ORDER– TRANSCRIPT OF "TWO ON TWO" BROADCAST

ANDERSON: "Along with people who are tuning up their bodies, you'll meet some Chicago area music lovers who are tuning up their pianos and learning how to play them."

WALLACE: "Saloons in the 'Old West' used to have signs that read: 'Don't shoot the piano player, he's doing the best he can.' Well, there's a new market for those signs, and the reason is that all across the nation, adults are doing something they always wanted to do but never had the time for—learn how to play that piano in the family room."

(Picture of Vladimir Horowitz playing the piano)

WALLACE: "No, this man doesn't take lessons. He's Vladimir Horowitz. He is to the private pianist as Jack Nicklaus is to the Saturday golfers. And it's much in that vein that adults are flocking to the piano bench these days, not to become a Horowitz or a Brubeck but simply to have fun.

"And one of the best ways to have fun taking lessons is with a group. How, you ask, can you learn piano with a roomful of other students banging away on the keyboard?

"Well, at the Northwestern University Music School electronic piano lab, it's easy."

(Picture of Jane McGraw speaking)

JANE McGRAW: "With these buttons, I can tune in and hear everyone in the class at once. I can hear just

one person playing at once or I can fix it so that they can hear me and I can't hear them so they can try out what I'm talking about."

WALLACE: "Instructor Jane McGraw teaches a 10 week program in beginning piano for adults. It costs $80 and is open to the public.

"The night we visited the class, students were busy at work on a simplified version of Brahm's 'Lullaby'.

"Instructor McGraw says her goal is to offer a balanced program that includes sight reading and understanding a basic musical principle. Does she expect to turn out a Horowitz?"

McGRAW: "No, this is purely for fun, but if one is developed at this point, I would make sure they knew it, the teacher."

WALLACE: "Among the students is Jerome Cohens, a Professor of Engineering who says his musical goals are at this point modest, but practical."

(Picture of Jerome Cohens speaking)

COHENS: "My goal is at Christmas parties, to be the guy they bring the drinks to."

WALLACE: "Scott Myers works in a Chem-Lab at Northwestern. He's had music lessons before on the clarinet, so he knows the difference between studying individually and with a group."

(Music in background—Picture of Scott Myers speaking)

MYERS: "You can have one-on-one instructions and yet, whenever the teacher chooses, you can hear how everybody else is doing and compare yourself."

WALLACE: "Marsha Mataval is a late comer to piano lessons, even though her family has had a piano for some time. Daughter, Sarina, is several years ahead of her at the keyboard and now Mom would like to catch up."

(Picture of Marsha Mataval speaking)

MATAVAL: "I'd like to be able to play some duets with my daughter and share the musical experience with her. That would be nice."

SARINA: "She doesn't practice too often and when she does practice, she tells me and my dad to keep quiet and now we don't have any fun."

(Laughter)

WALLACE: "The Northwestern program does stress practice. Francis Larrimer, Head of piano instruction of the school, says they're really are no shortcuts around it."

(Picture of Francis Larrimer speaking)

LARRIMER: "Playing a musical instrument, is very much like athletics. It requires a great deal of physical coordination and in order to develop facilities, one must work at it daily."

(Picture of Fine Arts Building)

WALLACE: "Not every music instruction program emphasizes practice however. In fact, for many, that's one of the most attractive aspects of Music Dynamics, nationwide piano school run by Paul Renard, who likens himself to Evelyn Wood, the high (inaudible) of speed reading.

"Renard's program of instruction is just that, he says. Programmed learning, which teaches students to sight read music without learning notes or scales. It's more like learning to type, he says. Renard explained part of his system to Harry Porterfield."

(Picture of Paul Renard speaking and demonstrating to Harry Porterfield.)

RENARD: "What the note's name is, is not important—only where—because we're looking for a location. So, that what we do here, in our picture, it's what we call intervals or distance between notes.

"You as a violinist know those because a violinist has to use them, as does a trombonist or a cellist. So, the interval becomes the distance between two notes and we

teach the individual to see these differences. So, for instance, these notes here would go; (DEMONSTRATES) D, 2nd, 2nd, 2nd. (MUSIC) And this would be 2nd again. It's the distance from note to note."

WALLACE: "Renard's system also incorporates something called Picture, Pulse and Anchor, which he says will enable a student to play simple tunes in as few as seven hours. The key to it all, he explains, is starting simply and proceeding gradually."

RENARD: "It's like anything else. It's a cinch by the inch, and hard by the yard, and we prefer to go slowly and give them a chance to get used to things. And, it's not hard to do. For most people, it's only hard to accept that it might be easy."

(Music in Background)

WALLACE: "Renard's lessons cost $12 an hour. He and his teaching staff see hundreds of students a week in Chicago alone. Most are adults like Peggy Ryan of Woodridge, an accountant with CNA Insurance. She started organ lessons with Music Dynamics two years ago, and believes she's made a lot of progress."

(Picture of Peggy Ryan playing the Berceuse from the opera "Joslyn")

RYAN: "I'm saying that my husband never listened to my organ playing when I first started. I used to put his headphones on his stereo and now he sits down in the chair and listens to me when I play. So, I feel I must have improved."

WALLACE: "Gaylon Sprimont is a 48 year old real estate salesman from Chicago. He's studied organ at Music Dynamics for three years. A year ago, he took up the piano too."

(Picture of Sprimont playing the Clementi Sonatina No. 1)

SPRIMONT: "I wanted a shortcut. I didn't want to do the scales and spending hours in labor or practicing at home. I didn't have time for it. So, I began three years ago on the organ with Paul and it's been very rewarding. It's exactly what I've been looking for.

WALLACE: "After hearing students from Music Dynamics and from Northwestern play, we wondered which program might be the better for someone anxious to learn to play for fun, but also play well. Sally Bower is an Assistant Professor of Piano at Roosevelt University's Chicago Musical College. We showed her tapes of students from both Music Dynamics and Northwestern's Beginning Adult Class."

BAUER: "From the tapes that we have seen of those two programs, they're without question, the musical level in the Northwestern program exceeds that of the other program. The people that you have spoken with and heard at Music Dynamics are very enthused about their work. But, I see greater independence musically in the works of the students at Northwestern."

WALLACE: "Mrs. Bower emphasized that the best way to judge any program is by whether it helps the student learn to play as well as he or she wants to learn. While, a Music Dynamics student might to some ears sound a bit mechanical and lack complete musicianship, Mrs. Pauline Archias is quite satisfied. She began with Renard 12 years ago at age 68, after another piano instructor told her she was too old for lessons. Today at 80, her playing brings enjoyment to her and her friends."

(Picture of Pauline Archias playing the theme from Dr. Zhivago)

ARCHIAS: "I have them—my ladies group over at my house, they like to come to my place because I play the organ for them."

WALLACE: "That's one of the things Mrs. Archias says her lessons have brought her. But, she places even more emphasis on something else."

ARCHIAS: "My family is so proud of me."

ANDERSON: "So, how do you pick a good piano teacher? Experts we've talked with said go to an established college or school and attend a student recital.

"If the students play well, they probably have good teachers.

"Our expert said, 'don't automatically sign up for lessons at the store where you bought your piano, and don't pick a teacher just because he or she lives near you.' "

WALLACE: "If possible, select an instructor who belongs to the Illinois State Music Teachers Association. That membership is usually an assurance of quality. As for cost, expect to pay $12 to $50 an hour or so.

"Good luck, and kids, don't shoot the piano player, Mom and Dad are doing the best they can!"

APPENDIX D

ILLINOIS STATUTES

Ill. Rev. Stat. ch. 110A, § 315(b)(3)

Leave to Appeal from the Appellate Court to the Supreme Court

(b) Time; Contents . . . . The petition for leave to appeal shall contain, in the following order:

* * *

(3) a statement of the points relied upon for reversal of the judgment of the Appellate Court.

* * *

Ill. Rev. Stat. ch. 110A, § 315(g)

Leave to Appeal from the Appellate Court to the Supreme Court

(g) Briefs. If leave to appeal is allowed, the appellant may allow his petition for leave to appeal to stand as his brief, or may file a brief in lieu of or supplemental thereto.

* * *

Briefs, pleadings and other documents filed with the Supreme Court in cases covered by this rule shall to the extent appropriate conform to Rules 341 and 344.

Ill. Rev. Stat. ch. 110A, § 341(e)(7)

Briefs

(e) Appellant's Brief. The appellant's brief shall contain the following parts in the order named:

* * *

(7) Argument, which shall contain the contentions of the appellant and the reasons therefor . . . . Points not argued are waived and shall not be raised in reply brief, in oral argument, or on petition for rehearing.

(3)

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CLERK

No. 84-1378

In the

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL RENARD,

Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation, CBS INC., a corporation, ROOSEVELT UNIVERSITY, a not-for-profit corporation, SUSAN ANDERSON, ROBERT WALLACE, HARRY PORTERFIELD, JAMES HATFIELD and SALLY BAUER,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Paul S. Renard, hereby submits this reply brief to the brief of all of the Respondents except Roosevelt University in opposition to the Petition for Writ of Certiorari.

CORRECTED JURISDICTIONAL STATEMENT

A portion of the last sentence of the jurisdictional statement on page 2 of the Petition was omitted by typographical error. The said last sentence is hereby amended to read as follows:

> "The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and this petition filed under 28 U.S.C. Sec. 2101(c)."

CORRECTIONS TO RESPONDENTS' SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the Respondents on page 1 of their brief to the effect that the facts of the case are stated in

the opinion of the Illinois Appellate Court is false. Since this case is presently concerned solely with a motion to dismiss the first amended complaint of the Plaintiff, as amended, the facts must necessarily arise from those pleadings. The statement of the case contained on pages 1 through 13 of the Petition is a complete and unbiased synopsis of those facts. (C 306-330, 341-343)

It should also be noted that not only have the Respondents been unable to show a single misstatement of fact in the Petition, they have also not challenged the allegations contained on pages 52 through 57 of the Petition which pointed out the omissions and substantial changes of facts made by the Appellate Court.

Most telling of all, however, is that the Respondents have omitted from their supplemental statement of the case

the same 11 items which were omitted from the telecast, and which are set forth on pages 32 through 35 of the Petition. They are thus attempting to conceal facts from this Court in precisely the same manner in which they concealed facts from the television audience. The first amended complaint alleges in detail and greatly expanded form that the statements of Bauer and Wallace, as set forth on page 4 of the Respondents' brief, are false. (C 319-320)

I

THE APPELLATE COURT MADE NO DETERMINATION THAT THE PROGRAM WAS DEFAMATORY WITHOUT REFERENCE TO THE INNOCENT CONSTRUCTION RULE AND THE FAIR COMMENT RULE

The Respondents state on page 6 of their brief as follows:

> "Thus, the Appellate Court ruled that the broadcast was not defamatory, i.e., 'it contained no false statements of fact injurious to

> plaintiff's reputation' . . . and that, alternatively, the allegedly defamatory statements were nonactionable expressions of opinion."

On page 7 of their brief, however, they change their minds that alternatively the statements were nonactionable opinions, and instead state as follows:

> "The lower courts applied the Illinois 'innocent construction rule' as an alternative basis for dismissing Petitioner's amended complaint - both courts squarely held, prior to applying the rule, that the broadcast simply did not contain a false statement of fact which could be construed, under any circumstances, as being injurious to Petitioner's reputation, business or profession." (Emphasis by the Respondents)

The above argument is, of course, absurd, since words that are not defamatory are by definition innocent, and therefore would never have any need for an innocent construction.

Apparently the pertinent portion of the Appellate Court opinion to which the Respondents refer is that contained in Petition Appendix page B-10, in which the court, immediately after analyzing the innocent construction rule, states as follows:

> "It is clear that the circuit court correctly determined as a matter of law that the 'Two on Two' segment featuring Plaintiff's music school was not defamatory. The segment merely examined two beginning piano courses and elicited an informal opinion from a third party as to the merits of

each; it contained no false statements of fact injurious to plaintiff's reputation."

At the outset, the following defects in these two sentences should be noted:

1. The Music Dynamics courses, with students taking lessons for two, three, and in one case twelve years, is obviously not a beginning course.

2. The court bases its decision on informal opinions, even though the Respondents had waived the fair comment rule.

3. The court finds there to be no false statements of fact because they are opinions, but as demonstrated in the Petition, since they do not meet the fair comment rule, the opinions are converted back into false statements of fact.

Every legal publication that has commented on this case has had problems

with the court's circular reasoning, and no legal publication whatsoever has ever found the court to have held there to be defamation without either or both the innocent construction rule and the use of nonactionable opinion.

Thus, in the headnotes to the official report of this case in 126 Ill. App. 3d 563, it is stated on page 563 as follows:

> "1. LIBEL AND SLANDER. Sec. 17-elicitation of informal opinions on merits of plaintiff's music school was nondefamatory as a matter of law. Broadcasters' elicitation of informal opinions on merits of plaintiff's music school was non-defamatory as a matter of law, under innocent construction rule, in absence of any false statements of fact to support claim of injury to plaintiff's business reputation on libel complaint."

In the headnotes to the official report of this case in 467 N.E. 2d 1090, it is stated on page 1091 as follows:

"3. Libel and Slander key 54

"Television program which showed piano teacher's students playing complex pieces at first sight while students from another school were shown playing a simplified, rehearsed piece, which did not inform audience of different circumstances under which students were performing, and which then elicted an informal opinion from a third party as to merits of each method of teaching contained no false statement of fact injurious to teacher's reputation, and thus, was not defamatory."

"4. Libel and Slander key 6(1)

"Third party's comments, made during television program showing piano

teacher's students playing complex pieces at first sight while students at second school were shown playing a simplified, reheased piece, that from tapes she had seen musical level in second program exceeded that in teacher's program and that she saw greater independence musically in works of students at second school, were merely her opinions as to merits of two programs featured in broadcast, and thus, comments were not actionable defamation of first school."

The Illinois Courts Bulletin, Vol. 30, No. 1, for September, 1984, on page 2 described the holding of the court as follows:

"Statements broadcast not actionable defamation where such comments, under any reasonable construction, con-

stituted mere opinion, not false statements injurious to plaintiff's reputation."

The Illinois Courts Bulletin description, despite its brevity, appears to be the most accurate analysis of all. The court applied the innocent construction rule to determine that the statements were opinions, and that since they were opinions, they could not be false statements of fact. The ruling, of course, arbitrarily and capriciously ignores the requirements of the fair comment rule which must be met before a statement can be considered a nonactionable opinion, arbitrarily and capriciously ignores the specific waiver of the fair comment rule by the Respondents, and arbitrarily and capriciously ignores the false implication rule, under which opinions are actionable, all of which were vigorously

asserted by the Petitioner. The Respondents have offered no explanation whatsoever for the failure of the Appellate Court to consider or even mention these three matters.

In view of the above interpretations, it is clear that if this case is allowed to stand, it will immediately begin to be cited as authority throughout the United States for false and defamatory statements in the form of opinions to be made with impunity, even though they have no factual basis and carry no false implication of knowledge. Such a philosophy does not spring from the First Amendment but arises rather from the dark tyrannical depths of propaganda minister Paul Joseph Goebbels.

II

THE INNOCENT CONSTRUCTION RULE AND THE ARBITRARY AND CAPRICIOUS ACTION OF THE APPELLATE COURT PRESENT IMPORTANT FEDERAL QUESTIONS THAT ARISE IN THIS CASE

It is well settled in Illinois that it is the judgment and not the opinion of the trial court that is the subject of review of the Appellate Court, and the Appellate Court is not bound by the reasons given by the trial court in sustaining its judgment. People ex rel. Rusch v. Fusco, 397 Ill. 468, 74 N. E. 2d 531 (1947). Thus, it is the reasoning and opinion of the Appellate Court, and not the trial court, which is to be considered in determing the Federal questions presently existing under this case.

As has been clearly shown in the preceding section, the Appellate Court reached its determination of no defamation by means of analyzing and then applying the innocent construction rule.

In order to sustain this rule, it was held that it does not violate the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. As was pointed out in the Petition, perhaps as many as one half of all persons bringing defamation suits in Illinois are denied recovery because of this rule. The Respondents have not been able to cite any constitutional authority whatsoever to refute the cases and reasoning cited in the Petition, but instead rely on the policy arguments in Chapski v. Copley Press, 92 Ill. 2d 344, 442 N. E. 3d 195 (1982). The policy of a rule of law, however, has nothing to do with whether its effect is to deny due process and equal protection of the law.

Arbitrary and capricious acts and decisions in civil actions are just as detrimental to the rights of individuals

and to the judicial system itself as they are when they occur in criminal matters. Although the Supreme Court has assiduously acted to make clear that it will not tolerate such conduct in the criminal field, it has not done so in civil matters. The present case presents an overwhelming opportunity for the Court to clarify the equal importance that civil actions also be free of arbitrary and capricious conduct.

The present case contains not just an isolated arbitrary and capricious act, but a plethora of them. The Petition sets forth a minimum of 18 separate arbitrary and capricious acts and omissions taken by the Appellate Court in one short opinion. Moreover, the opinion deals with a motion to dismiss, under which there is no factual controversy. While it is understandable that a court

might make one or two judicial errors, the commission of 18 separate items in the face of briefs that pointed out these items, and not involving any factual controversy, precludes any possibility that this was merely an error, and can only be explained as arbitrary and capricious judicial action.

The Respondents in their brief take the position that American Railway Express Co. v. Kentucky, is the only case which a petitioner can rely on in connection with arbitrary and capricious action, but this is not so. Other cases to the same effect are Corrigan v. Buckley, 271 U. S. 323 (1926), West v. Louisiana. 194 U. S. 258 (1904), and Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930).

III

THE FAIR COMMENT RULE AND FALSE IMPLICATION RULE ARE PROPERLY RAISED BY THE PETITIONER

The position of the Respondents set forth in footnote 6 on page 12 of their

brief, to the effect that since the Respondents did not raise the fair comment privilege nor was it decided by the trial or appellate courts, the Petitioner may not now raise it can only be described as weird. It is not the failure to raise the fair comment privilege to which the Petitioner objects. It is that the failure of the Respondents to meet its requirements precludes any part of the program from being legally considered an opinion, and thereby contravenes the Appellate Court's finding of no false statement of fact. Petitioner raised this defect in his lower court briefs.

Equally weird is the Respondents' assertion in the same footnote that the false implication rule is a doctrine with which they are not familiar.

This doctrine, which was raised in the lower court, is set forth on page 47

of the Petition, where the following statement is quoted from Catalano v. Pechous, 69 Ill. App. 2d 797, 387 N.E. 2d 714 (1st Dist., 1979):

> "Even assuming that this statement was merely one of opinion, liability for libel may attach with a negative characterization of a person coupled with a clear but false implication that he was privy to fact about the plaintiffs and their actions . . . ." (Emphasis supplied)

The doctrine is derived by the court from the basic holding of Hotchner v. Castilleo-Puche, 551 F. 2d 910 (2d Cir. 1977), which astoundingly is cited by the Respondents on page 12 of their brief.[1, 2]

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[1]The Respondents in footnote 5 on page 9 of their brief argue that since the due process and equal protection arguments had not been included in the Petitioner's "Petition for Appeal as a Matter of Right and in the Alternative for Leave to Appeal" filed with the Illinois Supreme Court, they had not been presented to the highest court

in the state in which a decision could be had, and therefore had been waived. They cite as authority Matthews v. Huwe, 269 U.S. 262 (1925), Beck v. Washington, 369 U.S. 541 (1962), Bailey v. Anderson, 326 U.S. 203, and Illinois Revised Statutes, Chapter 110A, Sections 315(b)(3), 315(g), and 341(e)(7).

At the outset, it should be noted that all three of the above cases hold that there to be no Federal requirement as to how state appellate procedure is to be followed, it only being necessary that the Petition follow state procedure. The Matthews case held the ruling of the highest court of a state in reviewing to take jurisdiction of the case would not be examined unless such refusal was on the merits, and that there was a waiver when there was a complete failure to file for a writ of error in the state supreme court. The Beck case and the Bailey case both held there to be a waiver not because the matter had not been raised in the highest court of the state, but because it had not been raised in the lower court.

Illinois does not require that all matters sought to be reviewed must first be raised in the initial petition filed with the Illinois Supreme Court. In Aurora, E & C. R. Co. v. Ruch, 243 Ill. 474, 90 N.E. 924 (1910), the Illinois Supreme Court, in analyzing a petition for writ of certiorari under a former similar practice, specifically held that it was not expected that every question of law and fact arising in every aspect of the case be raised and discussed in the petition, since this is the purpose of the brief. Illinois Revised Statutes, Chapter 110A, Section 341(e)(7), cited by the Respondents, is in consonance with this policy, and provides not that points not raised in the petition are waived, but rather that points not raised in the brief are waived. Since the petition was denied, no brief was filed, and there was no hearing on the merits.

Dated: May 8, 1985
Chicago, Illinois

Respectfully submitted,

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[2]The Respondents in footnote 7 on page 12 of their brief point out that the Petitioner did not raise in the Appellate Court the issue of arbitrary and capricious exercise of power in the trial court.

This issue was not raised in the Appellate Court because it did not appear that the action of the trial court was arbitrary and capricious.

The trial court attached to its opinion an entire and unedited transcript of the broadcast, and held that the broadcast could be innocently construed as an innocuous comparison. Under this portion of the ruling it was irrelevant that opinions were involved because their contents were not defamatory. Although the Petitioner disagreed with the trial court's ruling there was nothing to indicate that it was arbitrary and capricious. The Appellate Court, on the other hand, changed and omitted facts contained in the broadcast, and held it not to be defamatory not because it was an innocuous comparison, but because it could be innocently construed to contain no false statements of fact. This ruling was totally dependent on the fair comment and false implication rules, which the court ignored. The Petitioner regarded such conduct as arbitrary and capricious, and even the Respondents can offer no explanation for it.